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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1909~~ 133

LEMOIN CREE AND MARIA CREE, HIS WIFE, AND FREE-THOUGHT SOCIETY OF AMERICA, AN OHIO CORPORATION,

Petitioners,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY AND JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND *or for Remand*

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Is Article 81, Section 9(4) of the Annotated Code of Maryland (Michie, 1957), granting exemption from real property taxation to religious houses of worship, and appurtenant parsonages and grounds, unconstitutional, as being in violation of the Establishment or Free Exercise Clauses of the First Amendment as applied to the states by the Fourteenth Amendment to the United States Constitution, and as being in violation of the Fourteenth Amendment prohibition against deprivation of property (tax monies) without due process of law 3

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LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY AND JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND *or for Remand*

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above case on March 16, 1966, affirming the judgment of the Circuit Court No. 2 of Baltimore City (an

Equity court), in its denial of the Petitioners' Bill for Declaratory Judgment and Injunctive Relief, in which they had sought a declaration of unconstitutionality of tax exemption statutes on real property of churches used as houses of worship, and injunctions to require the levying of real property taxes on these houses of worship, theretofore exempt.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at —Md.—, 216 A2d 897 and is set forth in the Appendix hereto, at pp. 1A to 20A.

The Opinion of the court of first impression, the Circuit Court No. 2 of Baltimore City, was reported in the Daily Record (Baltimore) of February 19, 1966, and is set forth in the Joint Appendix below, nine copies of which are filed herewith, at pp. E. 1 to E. 33. Portions of this Opinion (E. 5 through E. 11) were adopted by all parties below as the Statement of Facts below, and other portions (E. 1-E. 5) as the Statement of the Case of some of the parties.

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that state was entered by way of filing of the Mandate of the Court on March 16, 1966 upon the affirmation of the Decree below filed with the Opinion of the Court of Appeals on February 16, 1966 (Appendix p. 21A). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been asserted below and claimed here, denial of rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision, ruled upon these said matters of denial of rights, privileges and immunities unfavorably to the Petitioners.

QUESTION PRESENTED

Is Article 81, Section 9(4) of the Annotated Code of Maryland (Michie, 1957), granting exemption from real property taxation to religious houses of worship, and appurtenant parsonages and grounds, unconstitutional, as being in violation of the Establishment or Free Exercise Clauses of the First Amendment as applied to the states by the Fourteenth Amendment to the United States Constitution, and as being in violation of the Fourteenth Amendment prohibition against deprivation of property (tax monies) without due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following:

1. A portion of the Fourteenth Amendment to the Constitution of the United States:

> "... No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment:

> "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof. . . .

3. Article 81 Sec. 9(4) of the Annotated Code of Maryland (Michie, 1957):

> "Section 9—The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:

"... (4) Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof."

STATEMENT OF THE CASE

An appeal was filed in this case to the Court of Appeals of Maryland from a Decree of the Circuit Court No. 2 of Baltimore City (Barnes, J.), dismissing with prejudice the Petitioners' Complaint attacking Maryland Code Article 81 Sec. 9(4), on the basis of constitutional invalidity (E. 37-38. See paragraph 7 (d) and (e) of the Complaint) as being in violation of the Establishment and Free Exercise Clauses of the First Amendment (7(d) of the Complaint) as applied to the states by the Fourteenth, and also as being in violation of the Fourteenth Amendment's prohibition against the taking of private property (in the form of taxes) for non-public purposes (impliedly) and without due process of law (explicitly) (7(e) of the Complaint). Article 81 Sec. 9(4) exempts houses of religious worship, and appurtenant grounds and parsonages from city, state or county taxation.

Judge Barnes ruled:

(a.) Standing.

"The Maryland law clearly gives relief to taxpayers in a class action in this type of situation.

"Both the *Frothingham* [*Frothingham* v. *Mellon*, 262 U.S. 447] and *Elliott* [*Elliott* v. *White* 23 F2d 997 C.A.D.C.] cases involved suits by a single taxpayer and were not brought as a class suit. It seems doubtful that they are authority for holding that a taxpayer class action may not be enter-

tained in the federal courts . . .'' (E. 18 Joint Appendix below.)

(b.) ''The exemption does not violate the Fourteenth Amendment to the Constitution of the United States prohibiting a State from denying citizens of the United States, life, liberty, or property without due process of law'' (E. 22 Joint Appendix Below.)

(c.) ''The exemption does not violate the First Amendment to the Constitution of the United States, as made applicable to the State by the Fourteenth Amendment, prohibiting Congress (and now the General Assembly of Maryland) from making any law 'respecting an establishment of religion or prohibiting the free exercise thereof.' '' (E. 26 Joint Appendix Below.)

The Court of Appeals (Oppenheimer, J.), affirmed Judge Barnes' decision, though without treating every point raised, and held:

(a.) ''The Appellants' Standing to Sue.

''In Maryland, taxpayers have standing to bring suit to challenge the constitutionality of a statute when the statute as applied increases their taxes . . . A class suit is here involved. . . .'' (Appendix p. 5A).

(b.) ''The Equal Protection Clause of the Fourteenth Amendment.

''. . . Apart however, from the possible impact of the First Amendment, it is evident to us that under the subsection (9 (4) of Art. 81), all organizations having beliefs about religion are treated uniformly as a class, and that the exemption here involved does not violate the equal protection clause.'' (Appendix p. 10A, 11A).

(The Due Process Clause itself was not discussed).

(c.) "The First Amendment

> "The Supreme Court of the United States has firmly established that the Fourteenth Amendment makes the First Amendment applicable to the states. *McGowan . . . Torcaso . . . Sherbert . . . .*" (Appendix p. 12A.)

Then, in the pages which follow, **it is here,** (Appendix pp. 16A-20A) that the Maryland Court treats most directly of those Separation issues which it *did* discuss. (It also did not discuss the Petitioners' Free Exercise argument.):

> "As *McGowan* makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is *primarily* secular and if those secular purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the 'establishment' clause is not violated. (Emph. supp..) (Appendix p. 16A.)
>
> "It is not disputed that today religious organizations as a *major* part of their functions, carry on activities secular in nature, of substantial benefit to the community such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities.* Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services (Emph. supp..). . . . (Appendix p. 16A.)

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* The Petitioners herein dispute it. They filed a Motion for Reargument (Appendix p. 21A) in furtherance of that disputation and asking for an opportunity to dispute in open court by means of evidence and statistics. The Maryland Court of Appeals rejected the offer. (Appendix p. 20A.)

"Apart from these considerations there is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. . . . The increase in the general tax base through the building of houses and apartment houses by persons attracted by the presence of a church in the neighborhood is a governmental motive *in no way connected with the support or establishment of religion. . . .*" (Emph. supp..) (Appendix p. 18A.)

"We do not reach the question of whether, absent the tax exemption here involved, the taxation of church owned properties would violate the 'free exercise' clause of the First Amendment*. For the reasons set forth, we hold that the exemption does not violate the 'establishment' clause, and is constitutional.

"Decree affirmed; costs to be paid by appellants." (Appendix p. 20A.)

Motion for Reargument

Following the filing of the Opinion of the Maryland Court of Appeals, the Petitioners promptly filed a Motion for Reargument for the purpose of traversing the Court's judicial notice of a matter far removed, it is respectfully argued, from the "judicial notice" realm, and a matter which, of course, was certainly not in evidence in the case.

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* Free Exercise of the *Respondents;* as was said, the Maryland Court did not reply to the Free Exercise argument of the *Petitioners* herein.

The Motion for Reargument stated:

> "That the Opinion of this Honorable Court filed February 14, 1966 in the within cause, appears to have taken judicial notice of certain matters not in evidence, and the said Opinion was based in substantial part upon said matters, namely; that churches engage in certain beneficial public welfare activities of a secular nature, and it was apparently concluded by this Honorable Court, that these activities are inseparable from the religious activities of said churches. . . .
>
> "The Intervening Appellants believe that if such be the case, it is true to greatly varying degrees, such public activities being nearly non-existent in the case of some churches, and yet being in no case more than a minority proportion of the activities of any church; and the Intervening Appellants believe that they could show on remand, by budgetary analyses as well as by expert and non-expert testimony, that nearly all of the activities of churches are proportionally separable into categories, religious and secular; that the proportions and degrees of such activities are not only demonstrable, but are most significantly pertinent to the issues in this case. . . .
>
> "In any event the Intervening Appellants urge that the questions alluded to above represent substantial important questions of fact, and of degree and that they would desire to present argument to that effect, for only by so doing and by permitting the introduction of additional evidence upon the matters mentioned, it is respectfully urged, can the substantial factual merits of the case, be fully reached and analyzed."

The Motion for Reargument was denied also.

This Petition is therefore brought, as Petitioners believe that the determination of the substantial question involved

was resolved by the Court below in a manner in conflict with principles theretofore expressed by this Court, particularly in *Schempp* (infra p. 9).

ARGUMENT

GENERAL REASONS FOR GRANTING THE WRIT

The exemptions granted under Article 81, Section 9 (4) of the Maryland Code are unconstitutional, being in violation of the First and Fourteenth Amendments to the Constitution of the United States; both the Establishment and Free Exercise Clauses.

STARE DECISIS

The Schempp Case

School District of Abington Township v. Schempp, 83 S. Ct. 1560, 374 U.S. 203, 10 L. Ed. 2nd. 844, 1963, (Clark, J.) was a quite specific holding upon the question of public aid—direct or indirect—to the advancement of religion as such.

The Court there stated (at p. 1567),

> "Nothing but the most telling of personal experiences in religious persecution suffered by our forbears, see *Everson v. Board of Education* (330 U.S. 1) at 8-11, could have planted our belief in liberty of religious opinion any more deeply in our heritage . . . .
>
> [At 1567] " 'The government is neutral, and, while protecting all, it prefers none, and it disparages none.' "

The Court then discusses the "reach" (p. 1567) of the First Amendment.

"First, this Court has decisively settled that the First Amendment's mandate . . . has been made wholly applicable to the states by the Fourteenth . . .

"Second, [p. 1568] this Court has rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another . . .' [n]either a state nor the Federal government can . . . pass laws which aid one religion, *aid all religions,* or prefer one religion over another' . . . .

> " 'There is no answer to the proposition . . . that the effect . . . was to take *every* form of propagation of religion out of the realm of things which could *directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense* . . . .'
> . . .
> ". . . '[T]he object . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by *comprehensively* forbidding *every form of public aid or support for religion.*'

"The same conclusion has been firmly maintained ever since that time, see *Illinois ex. rel. McCollum . . . McGowan v. Maryland . . . Torcaso v. Watkins . . .* and we reaffirm it now." (Emph. supp. throughout.)

The Ideas of the Schempp Case Are Ancient

There are those who would contend that these are new ideas, marking a departure in American jurisprudence from earlier ideas, yet Dr. Franklin H. Littell, a Methodist minister, a member of the Department of Religious Liberty of the National Council of Churches, an "Official Observer" at the Ecumenical Council, Vatican II, and a professor of Church History at Chicago Theological Seminary, in re-

marks before the House Judiciary Committee, May 8, 1964, stated that First Amendment freedoms,

> "were not created by the Bill of Rights: The Bill of Rights simply declared truths which were already true, recognized rights which were already given by the Author of our liberties himself."[1]

> ". . . What (our forefathers) did was to separate the two covenants—the political from the religious . . . . The true religious implication of the standard they raised has been summarized by the great Church historian, Philip Schaff, *in 1857:*

> > 'The glory of America is a free Christianity, independent of the secular government, and supported by the voluntary contributions of a free people. This is one of the greatest facts in modern history' ".[2]

The Ideas Of The Schempp Case Are An Urgent Necessity For Today

And, we are not yet monolithic; at this point in our history, "our religious composition makes us a vastly more diverse people than were our forefathers".[3]

Professor Kurland is quite clear on the subject of the interpretation of the First Amendment. As he puts it:

> ". . . the freedom and separation clauses should be read as a single precept, that government cannot utilize religion as a *standard* for action *or inaction* because

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[1] Madison called them ". . . of the natural rights of mankind." Hunt, Galliard, *Annual Report of the American Historical Association* (1901) I, 427-8.

[2] Schaff, Philip, *Germany: Its Universities, Theology and Religion* . . ., (Phila. and N.Y., Lindsay and Blakiston/Sheldon, Blakeman and Company, 1857), p. 105.

[3] Mr. Justice Brennan, concurring in *School District v. Schempp,* 83 S. Ct. 1560, 374 U.S. 203, 10 L. Ed. 2nd. 844.

these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden".[4]

Which is just what Mr. Justice Brennan in his concurrence, in *School District v. Schempp,* said later:

> "The purpose of the Establishment Clause was to assure that the . . . legislature . . . would not . . . make of religion, as religion, *an object of legislation.*"[5]

A Cleric's Opinion of Tax Exemption

The Dean of the Boston College Law School, Father Robert F. Drinan, S.J., in his book, *Religion, the Courts, and Public Policy* (1963, McGraw-Hill), has written (p. 9), under the topic "Tax Exemption for Religious Institutions",

> "No entirely satisfactory rationale for tax exemption has ever been stated in any American judicial decision".

And at p. 6,

> "The tangible benefits to religious bodies from such practices as tax exemption for churches . . . are evident. But the intangible benefits deriving from the juridical acceptance of the importance of the spiritual order are far more valuable (and a far greater breach of church-state separation!) (sic) than any possible list of material or financial aid . . . ."

On Standing

One who is taxed has the right to question another's exemption from taxation. *Lawrence v. State Tax Commission,* 286 U.S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374.

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[4] Kurland, Philip B., *Religion and the Law* (1962), p. 18.

[5] *School District v. Schempp,* 83 S. Ct. 1560, 374 U.S. 203, 10 L. Ed. 2nd. 844.

As long, that is, as the complainant is a state, not a federal, taxpayer. *Frothingham v. Mellon,* 262 U.S. 44 (1923).[6]

Both the court of first impression and the Maryland Court of Appeals ruled in Petitioners' favor on this point. Appendix p. 13 and p. E.18 Joint Appendix below.

Free Exercise

The rationale of the Petitioners' Free Exercise argument is that they are being called upon to offer financial support to the religious beliefs of others, and that they are thereby denied the right to the unfettered exercise of their particular religious belief, which, it happens, is a strongly held, and firmly declared *absence of belief* in a religion. This belief is clearly encroached upon by the Petitioners' required support of religious houses of worship.

That the exemption questioned *is the exact equivalent of financial support* is agreed to by the Maryland Court, (Appendix p. 14A) but yet the question of the concommitant encroachment on the Petitioners' Free Exercise right was not mentioned. It is respectfully suggested that without meeting this issue, the Maryland Court could not well have ruled correctly.

The Free Exercise question *was* raised by the Petitioners, in their original pleading, paragraph no. 7(d), Joint Appendix p. E.38, and *was* decided, adversely to the Petitioners, by His Honor Judge Barnes in the *nisi prius* case based upon his interpretation of this Court's Opinion in *Schempp,* supra.

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[6] Possibly even this restriction has been misunderstood. See Opinion of the lower Court herein, discussing *Frothingham* and *Elliott v. White,* 23 F.2d 997, at p. E. 16-17 of the Joint Appendix below.

See p. E. 28 of the lower Court's Opinion:

> "The Court rejects the position advanced by the Plaintiffs and holds that the exemption is a reasonable, proper and non-discriminatory exemption which does not result in an establishment of religion or prohibit the (note: the clear sense here is *the Plaintiffs'*) free exercise thereof . . . .

(E. 29:)

> "The exemption involved in the case at bar represents government neutrality not prohibited by the First Amendment . . . . Such validity is indicated by Mr. Justice Brennan in his concurring opinion in *Abington* . . .
>
> > " 'Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and non-profit organizations . . . .' "

Due Process

The Due Process clause was also brought into question by the Petitioners, in paragraph 7 (e) of the Complaint (p. E. 38, Joint Appendix); the argument was specifically rejected by Judge Barnes (E. 22-E. 26 Joint Appendix), but this question also was not reached by the Court of Appeals.

SPECIFIC REASONS FOR GRANTING THE WRIT

Thus the Maryland Court has rendered an important Opinion, one which is sure to be widely quoted by other Courts seeking to uphold this and other manner of public aid to private endeavor-for in sooth, there is undeniably nothing more private than religious belief-and the Maryland Court has done so while (a.) failing to fully meet important constitutional issues raised by the Petitioners, (b.) by misconstruing, it is respectfully suggested,

Schempp in a manner certain, unless corrected by this Court, to lead to miscontruction by other state courts, and (c.) by calling upon a brand new, never heretofore proposed public benefit theory which *this* court has never approved or disapproved:

(1.) that churches in a neighborhood enhance land values and this is a sufficient public purpose to justify tax exemption (Appendix p. 17A to 19A), and

(2.) that the tax support given in the form of an exemption (the Maryland Court has equated the two. Appendix, p. 14A) is justifiable by virtue of the fact that churches perform valuable public service and welfare functions, which, if they did not perform and pay for, the state would have to perform and pay for (Appendix, p. 16A-17A).

As to both (1) and (2) there was no evidence in the case upon these points, and to have decided so important a matter absent such evidence was to decide the case on intuition.

Genius or Madness

More important, for the purposes of this Petition, the desire to give *churches* a blank check for the performance of public service and public welfare functions, and to thus abdicate state responsibility for policy in these fields is, if not sheer madness, then sheer genius in public administration, and the principle should be applied at once in other fields of public endeavor, if genius, or struck down by this Court now, if madness, before the madness spreads farther.

CONCLUSION

Wherefore, it is prayed that the Writ of Certiorari requested be granted, that the holding of the Maryland Court may be reversed on First Amendment grounds, or that the

case may be remanded for the taking of further testimony in accord with an Order of this Court, to ascertain the facts as to matters which the Court below assumed, but should not have assumed, to be true.

Respectfully submitted,

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Opinion of the Court of Appeals of Maryland

OPPENHEIMER, J.—

Maryland's statutory exemption from state, county and city taxation of structures used exclusively for public worship and any parsonage and grounds appurtenant thereto is attacked as violative of the Declaration of Rights of the Maryland Constitution and of the First and Fourteenth Amendments to the Constitution of the United States. The question is raised by a taxpayers' suit filed by Mrs. Murray as trustee and Mrs. Mays, as taxpayers and citizens of Maryland, on their own behalf and on behalf of all other taxpayers similarly situated, in the Circuit Court No. 2 of Baltimore City. Mr. and Mrs. Lemoin Cree, residents and taxpayers in Frederick County, and Freethought Society of America, an Ohio corporation which owns real estate in Baltimore City, were permitted to intervene as additional parties plaintiff. The defendants are the Comptroller of the Treasury of Maryland, the State Director of Assessments and Taxation, the Supervisor of Assessments of Baltimore City and the Director of Assessments for Baltimore City. The court below permitted five religious bodies to intervene as parties defendant: the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church in The Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America.

The statute attacked as unconstitutional is Code (1965 Repl. Vol.) Art. 81, Section 9(4) which reads as follows:

> "§9.—*Exemptions.*
>
> The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:
>
> • • •

> "(4) *Churches, parsonage, etc.*—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof."

At the time the suit was filed, there were 57 items of exempt property set forth in Section 9, including the buildings and grounds of hospitals, charitable institutions, educational and literary institutions, nonpolitical clubs and Boy and Girl Scouts.[1]

Mrs. Murray, one of the original plaintiffs,[2] and Mr. Cree, an intervening plaintiff, are atheists. Mrs. Murray as, trustee and Mrs. Mays, the original plaintiffs, own property in Baltimore City on which, in 1964, they paid taxes of $353.50. Mr. Cree is a Research Analyst in Micro-biology at Fort Detrich, in Frederick County. He and his wife own about two acres of land in that county upon which they paid taxes, in 1964, to the county and State of Maryland in the amount of $40. The Freethought Society of America, Inc. publishes the "American Atheist," a monthly magazine. It owns a building in Baltimore upon which taxes were paid, in 1964, in the amount of $350.09.

The plaintiffs-appellants contend that the exemptions granted under Subsection 9(4) of the Maryland statute violate Articles 15, 23 and 36 of the Maryland Declaration of Rights; that they are in violation of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution; and are in violation of the First Amendment to the Constitution made applicable to the

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[1]At the present time, there are 60 categories of exempted property. Code (1965 Repl. Vol.) Article 81, Section 9.

[2]Mrs. Murray was not in the State at the time of the hearing below and did not testify. Her beliefs about religion, however, are set forth in Abington School Dist. vs. Schempp, 374 U.S. 203, 211 (1963) and Murray vs. Burns, 405 P. 2d 309 (Haw. 1965).

states through the Fourteenth. The defendants-appellees maintain that the exemptions are constitutional under both the Maryland Declaration of Rights and the federal Constitution. The appellee Temple Emanuel contended below and contends here that the taxation of property used for worship would unconstitutionally abridge the free exercise of religion protected by the First Amendment. The Maryland Synod of the Lutheran Church joins in this contention in this appeal. All of the appellees contend further that the appellants do not have standing to bring the suit.

At the hearing below, it was shown that the records of Baltimore City indicate the total assessable basis of the city for 1964 as follows:

All taxable real property	$2,263,708,768.00
All tax exempt property	578,997,400.00

The approximate total assessments exempt from taxation in the City in the levy for 1964 under the statutory provision here involved was as follows:

Protestant	$41,031,430
Roman Catholic	31,389,880
Jewish	6,136,510

The Chancellor found that the total assessed value of real estate in Baltimore City exempt from taxation under Article 81 Section 9 is over 20% of the total assessed value of all real estate in Baltimore. The exemption under the subsection here involved is approximately 2.8% of the total assessed value of all Baltimore City real estate and approximately 13½% of the total assessed value of tax exempt real estate in the City. The state tax rate, levied to protect the bond issues of the State, is fifteen cents for $100 of assessed value.

It was agreed that the Roman Catholic Archbishop of Baltimore is a corporation having title to various properties of the Roman Catholic Church of Baltimore City,

including 163 parishes or mission churches with an aggregate value of Diocesan properties in excess of $2,000,000. The Maryland Synod of the Lutheran Church owns property in Baltimore City in excess of $13,600,000. Temple Emanuel is a Reform Jewish Congregation whose synagogue is in Baltimore City.

At the hearing, Mr. John G. Arthur, Director of the Department of Assessments of Baltimore City, who has been with that department for 38 years, testified for the appellants. His testimony as to applying the statutory exemption was summarized by Judge Barnes as follows:

> "In applying this exemption, Mr. Arthur and the City Department of Assessments have given the words 'public worship' a comprehensive interpretation. Houses, buildings and appurtenant lands used for teaching or contemplating the beliefs of *any* philosophical system regardless of whether that philosophical system includes a belief in a Supreme Being, are considered to be exempt under Section 9 (4) and such exemptions are granted in the regular course of administering the tax laws. For example, the property used by the Baltimore Ethical Culture Society which does not teach any belief in a Supreme Being, but which confines its teachings to moral and ethical standards and educational purposes has been exempted under Section 9 (4). Property used by Buddhist organizations for their religious teachings are exempted. The Philosophical College of Occult Science has had its property exempted under Section 9 (4). Over objection and subject to exception, Mr. Arthur testified that after having heard Mr. Cree describe his philosophical system, if application were made, the property of the Freethought Society would be granted an exemption under Section 9 (4)."

The Chancellor also found that the real property of churches not used for houses of worship and parsonages, but held for other use and for future construction of church edifices is subject to real estate taxation to the same extent as similar property held by private persons.

At the conclusion of the case below, Judge Barnes, in a comprehensive opinion, found that the plaintiffs-appellants had standing to sue but that the statutory exemption here involved did not violate the Maryland Declaration of Rights or the federal Constitution. In this appeal from his decision, we shall first consider the standing of the appellants to sue, then the questions raised under the Maryland Declaration of Rights and, finally, the issues under the federal Constitution.

The Appellants' Standing to Sue

In Maryland, taxpayers have standing to bring suit to challenge the constitutionality of a statute when the statute as applied increases their taxes. *McKaig vs. Mayor and City Council of Cumberland,* 208 Md. 95, 102-103, 106, 108, 116 A. 2d 384 (1955) and cases therein cited. If the taxpayers cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to challenge it. *Citizens Comm. vs. County Comm'rs. of Anne Arundel County,* 233 Md. 398, 401-405, 197 A. 2d 108 (1964) and cases therein cited.

A class suit is here involved. Under Section 9 (4) over $78 million dollars of real estate is exempted from taxation out of a total assessment basis of Baltimore City of over $2 billion. The class of taxpayers represented by the appellants, other than the Crees, would pay less real estate taxes to the City if the exemption were not in effect. The property owners who pay real estate taxes to the state, represented by all the appellants, would pay less taxes to the state if the exempted property were taxed.

The appellees rely on statements in *Citizens Committee* that the appellants there had failed to show any special damage or loss peculiar to themselves as taxpayers or otherwise, and that, to have standing, the persons who bring the suit must show a special interest in the subject matter distinct from that of the general public. In *Citizens Committee,* the appellants had filed suit as citizens

and taxpayers to challenge the constitutionality of local laws and resolutions authorizing the operation of gambling devices in Anne Arundel County. The Court found it evident that the taxpayers would be damaged by a discontinuance of the program rather than a continuance of it. Here, the converse is true.

The appellees further contend that, even if the appellants have standing to sue under the Maryland law, they lack standing under the federal law to attack the constitutionality of the statute under the federal Constitution. We do not agree. When the validity of a state statute is attacked in a state court, it is the duty of that court to determine all the constitutional issues involved, federal as well as state. If the statute is held valid under the state law, but invalid under the federal Constitution, the state court must give the complainants the relief they pray. The appellants have elected to raise the federal Constitutional questions in a state court, as they had the right to do. If they have standing under the law of Maryland to bring the suit, it is irrelevant that the result might have been different had the action been instituted in a federal court.

The appellants had standing to bring the suit in Maryland courts, and, in their suit, to raise any constitutional question in respect of the statute, state or federal.

The Provisions of the Maryland Declaration of Rights

The appellants contend that the subsection of the statute is unconstitutional under Articles 15, 23 and 36 of the Maryland Declaration of Rights. Article 15 provides that all taxes for the support of the state and local governments shall be uniform. Article 23 states that no man shall be deprived of life, liberty or property except by the law of the land, which, this Court has held, is the equivalent of due process of law. Article 36 deals with religious freedom; it provides, in part, that no person ought to be compelled to maintain or contribute to maintain any place of worship or any ministry.

This Court has consistently recognized the power of the legislature to grant full exemptions from taxation when reasonable and for a public purpose. *State Tax Com'n. vs. Gales,* 222 Md. 543, 548-550, 161 A. 2d 676 (1960) and authorities therein cited. When made for such a purpose and uniformly applied, the exemption does not violate Article 15 of the Declaration of Rights (even before the 1915 amendment when uniformity was required with regard to assessment as well as with regard to tax rates) or due process of law under Article 23. *National Can Corp. vs. Tax Com'n.,* 220 Md. 418, 153 A. 2d 287 (1959); *State Tax Com'n. vs. Gales, supra.* See also *Armco Steel Corp. vs. State Dept. of Assessments and Taxation,* 236 Md. 168, 175-176, 202 A. 2d 741 (1964).

Williams vs. Mayor and City Council of Baltimore, 289 U. S. 36, 41 (1933) involved the validity of a Maryland statute under which the property of a particular railroad was made exempt from taxation. The cities of Baltimore and Annapolis challenged the validity of the exemption. The District Court upheld the validity of the statutory exemption, the Circuit Court reversed, and the Supreme Court reversed the Circuit Court. In delivering the Supreme Court's opinion, Mr. Justice Cardozo held that the municipal corporations, being creations of the state, were without standing to invoke the protection of the federal Constitution but that the statute was valid under Article 15 of the Maryland Declaration of Rights. He said:

> "The courts of Maryland hold that the rule of uniformity established by these provisions does not forbid the creation of reasonable exemptions in furtherance of the public good * * * * It does not even prohibit an exemption in favor of an individual as distinguished from one for the benefit of the members of a class. All that it exacts in respect of the narrower exemption is the presence of a relation, fairly discernible, between the good of the individual and the good of the community."

General Tax exemptions for property dedicated to religious uses have long been regarded in Maryland as reasonable and for a public purpose. The Chancellor succinctly gave the history of tax exemption of houses of worship in Maryland as follows:

> "An exemption from taxation similar to that granted by Section 9(4) has existed in Maryland since the State began the general taxation of real estate by the Act of 1797, Chapter 89, passed on January 20, 1798. The exemption in that Act was: 'except property belonging to the State or the United States, houses for public worship, burying grounds . . .'. This basic exemption has continued in each tax statute adopted in Maryland since the original Act of 1797, Chapter 89 until the present time."

Concurrently with this continuous exemption, Maryland has had in effect another measure, Article 38 of the Declaration of Rights, directed to the separation of church and state. That Article requires the sanction of the General Assembly for any gift, sale or devise of land "for the support or benefit of any Religious Sect. Order or Denomination * * *; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, * * *" for a house of worship, a parsonage, or burying ground.

In *Vansant vs. Roberts,* 3 Md. 119, 128-29 (1852), the Court considered the purpose of this Article. Judge Mason, for the Court, said:

> "The 34th section of the Bill of Rights is analogous to the British *statutes of mortmain,* which were introduced to check or prevent ecclesiastics from accumulating in perpetuity, in *mortua manu,* or hands that never die, the lands or property of the kingdom, and thereby withdrawing them from public and feudal charges. This provision in our Bill of Rights, was designed for the protection or benefit of the people of Maryland from similar evils, * * *"

In 1948, by constitutional amendment, Article 38 was changed so as not to require the sanction of the General Assembly to a gift, sale or devise to a religious organization, but the legislature was given the right to require such sanction by statute. While the ownership of land by a religious organization has been consistently circumscribed by constitutional provision, therefore, gifts or devises for houses of worship and parsonages have been permitted, in the same Article, without legislative sanction.

Baltimore City vs. Starr Church, 106 Md. 281, 286, 67 Atl. 261 (1907) held that a special act of the legislature granting exemption for a specific property owned by a church of one denomination was unconstitutional, because it violated Articles 15 of the Declaration of Rights and Article III, Section 33 of the Maryland Constitution. However, Judge Rogers, for the Court, had this to say as to the validity of the statutory exemption from taxation of houses used for public worship:

> "It will not be denied at this late day that the Legislature has the power, *within reasonable limits,* to exempt certain *species* or *classes* of property from taxation, when the *public interests* so require. This is actually done in the case of houses used exclusively for public worship, and the grounds appurtenant thereto, in the case of graveyards and cemeteries, and in the case of hospitals, asylums and benevolent institutions. (Code, 1904, Art. 81 sec. 4.) The validity of provisions of this kind is too well established to be now questioned. But it will be perceived in these cases *all* the property of the *class* indicated is exempted. The Legislature does not exempt *some* houses of public worship and tax others. It does not exempt *some* graveyards and cemeteries, *some* hospitals, and then tax other properties of exactly the same kind. It does not arbitrarily say that *this* particular house of public worship shall be exempt, but *that* one shall be taxed. On the contrary, *all* property falling within any one of the classes

mentioned in Sec. 4, is exempt. There is therefore no arbitrary discrimination between different properties of the same kind, but all are treated alike."

Occasionally a dictum, when it strikes a note resonant with accepted legal principle, becomes as important as the actual decision. This has been the case in *Starr*. The statement quoted has been cited with approval as late as *State Tax Com'n. vs. Gales, supra.*

The exemption here involved violates no provision of the Maryland Declaration of Rights.

The Equal Protection Clause of the Fourteenth Amendment

The appellants contend that by the exemption here involved, the State of Maryland has deprived them of the equal protection of the law guaranteed by the Fourteenth Amendment and that the criterion for the distinction is discriminatory and not justificable under the Amendment.

The Supreme Court has repeatedly held that state exemptions of a class from taxation not clearly unreasonable do not infringe the equal protection clause. In *Carmichael vs. Southern Coal & Coke Co.*, 301 U. S. 495, 509 (1937), Mr. Justice Stone said, for the Court:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation * * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation."

In *Gibbons vs. District of Columbia*, 116 U. S. 404, 407-08 (1886), Archbishop Gibbons had appealed from a decree dismissing his bill in equity which claimed that the assessment and tax on lots owned by a Catholic church in

the City of Washington were in violation of an Act of Congress which exempted from taxation church buildings and grounds actually occupied by such buildings. A similar exemption had been in effect under authority delegated by Congress as early as 1802. The lots in question, the Court found on the uncontroverted facts, were unnecessary for the enjoyment of the church and were to be sold or leased. The Court held that, under the circumstances, the lots were not exempt from taxation. However, Mr. Justice Gray, in delivering the Court's opinion, said that the power of Congress functioning as a local legislature for the District of Columbia to levy taxes for District purposes only "in like manner as the legislature of a State may tax the people of a State for State purposes" was clear and that "[i]n the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In *Bell's Gap R. R. Co. vs. Pennsylvania*, 134 U. S. 232, 237 (1890), the Court said:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

The statements in *Gibbons* and *Bell's Gap* as to the validity of exemptions of church property from taxation are dicta, and in neither case was the applicability of the First Amendment, through the Fourteenth, considered. Apart, however, from the possible impact of the First Amendment, it is evident to us that, under the subsection, all organizations having beliefs about religion are treated uniformly as a class, and that the exemption here involved does not violate the equal protection clause.

The First Amendment

The appellants contend that the "establishment" clause of the First Amendment, made applicable to the states through the Fourteenth, prohibits indirect subsidies to religious organizations by tax exemption as clearly as it makes invalid any tax levied directly to support such organizations. The appellees Temple Emanuel and the Maryland Synod of the Lutheran Church take the position that, even without the statutory exemption, the "free exercise" clause of the First Amendment would make the taxation of the property of houses of worship unconstitutional. The other appellees maintain that the tax exemption is not within the category of governmental "establishments" proscribed by the Constitution, but is a permissible "accommodation" to religion which the government may, in pursuit of its policy or neutrality, grant to religious institutions in the same manner in which it grants similar exemptions to secular charitable institutions.

Issues Met

The Supreme Court of the United States has firmly established that the Fourteenth Amendment makes the First Amendment applicable to the states. *McGowan vs. Maryland,* 366 U.S. 420, 429 (1961) and cases cited in footnote 5; *Torcaso vs. Watkins,* 367 U.S. 488, 492 (1961); *Sherbert vs. Verner,* 374 U.S. 398, 402 (1963). The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" It was not until 1947 that the nature of the "establishment" clause was discussed in depth by the Supreme Court. *Everson vs. Board of Education,* 330 U.S. 1 (1947). Since *Everson,* there have been a number of decisions of that Court involving the "establishment" clause. The holdings of these cases are too well-known, their purport has been too widely discussed, and views of the individual Justices too often quoted and analyzed for us again to survey familiar ground. There are intimations or even expres-

sions of opinions by individual Justices on the questions here involved, but we agree with counsel that in no case has the Supreme Court given an opinion on or in specific terms discussed the constitutionality of tax exemptions of religious organizations.

In our reading of the opinions, however, we find broad guide lines which form the frame within which the case before us is to be considered. We are a religious people and recognize the effect religious institutions have on human activity. The First Amendment was designed to erect "a wall of separation between church and State." Mutual independence, under our Constitution, is deemed best for the State and best for religion. The State cannot forbid nor can it perform or aid in performing the religious function. Like other broad constitutional concepts, the meaning of "separation" is to be ascertained in the application of the principle to specific cases. A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.

In the consideration of the impact of the "establishment" clause upon the tax exemption here involved, some conclusions are evident. By granting the exemption to church properties, Maryland does not support all religious bodies or any of them in the sense that the state espouses their acceptance or the acceptance of any of them by its citizens. The exemption goes, not only to all church owned properties, but to all properties owned by any organization which has definite views about religious beliefs, including religions such as Buddhism and organizations such as the Ethical Society, which do not believe

in a Supreme Being. The property of the Freethought Society, one of the appellants, an atheistic organization, would be entitled to the exemption if it asked for it. In Maryland, a tax exemption is by no means synonymous with approval of the purposes of the body whose property is exempt. The property of charitable organizations is one of the 57 exempted categories. In *Register of Wills for Baltimore City vs. Cook,* (No. 145, Sept. Term 1965) decided February 3, 1966, we held that bequests creating trusts to be used, among other purposes, for the passage of the Equal Rights Amendment, to remove alleged discriminations against women, were entitled to exemption from collateral inheritance tax because the bequests were charitable in nature. If the funds left by the testatrix were used, in part, for the erection of a building for the administration of the trusts, the property would be exempt under Article 81, Section 9(7); but the exemption would not mean that Maryland favors the passage of the amendment.

Indubitably, religious organizations benefit from the exemption. Economically, they are in the same position as though they paid taxes to the city and state and then received back the amounts paid in the form of direct grants. Moreover, members of the general public pay higher taxes than they would if the exemptions were not in effect; the same amount of revenue must be raised and, by reason of the exemption, the rate paid by non-exempt taxpayers is higher.

To the appellants, this conclusion is the end of the case. They submit that the First Amendment forbids any appropriation of public funds to support religious organizations; that the effect of the exemption is the same as that of a direct appropriation; that the "establishment" clause bars not only laws establishing a church or sect, but any law respecting an establishment of religion; and that the Maryland statutory exemption is such a law, because the State cannot do indirectly what it cannot do directly. Logically, this argument is strong. But, as this Court has said before, logic is a minion of the law, not its

master. The question before us involves the power of a state to legislate for the general welfare as well as the constitutional prohibition, the assay of legislative motives, the weighing of economic factors apart from pecuniary benefit to religious organizations, and the historic attitude of the states and federal government towards the interpretation of the separation concept. Judicial duties would be easier if constitutional problems could be solved by logical theorems.

That the states do not believe tax exemption of the property of religious institutions violates any constitutional prohibition is evident. Constitutional or statutory provision for such exemption exists today in every state and the District of Columbia.[3] "This history cannot be explained solely as a carryover from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices:" Kauper, *The Constitutionality of Tax Exemptions for Religious Activities* in "The Wall Between Church and State", 95, 110 (Oaks ed. 1963).

It is true that the protection of individual rights guaranteed by the federal Bill of Rights is not dependent upon majority approval. It is also true that the historical argument, while it casts some light, is not conclusive. Compare *Brown vs. Board of Education*, 347 U.S. 483, 489 (1954), with *McGowan vs. Maryland*, 366 U.S. 420, 440-42 (1961). Nevertheless, in the words of Mr. Justice Holmes, "(i)f a thing has been practical for two

[3] Note, Constitutionality of Tax Benefits Accorded Religion, 49 Colum. L. Rev. 968 (1949); and Van Alstyne, "Tax Exemption of Church Property", 20 Ohio St. L. J. 461 (1959); Alaska and Hawaii, the last two states to be admitted to the Union, have similar exemptions. Alaska Const. Art. IX, sec. 4; Rev. Laws of Hawaii 1955 (1961 Supp.) ch. 128-18.

hundred years, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman vs. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). It is significant, in our opinion, that the act exempting church property in the District of Columbia from taxation (the successor of which was before the Court in *Gibbons vs. District of Columbia, supra*) was first adoped in 1802 by the corporation of the City of Washington (Act of Oct. 6, 1802, ch. 5, Washington City Laws 1802-03) under authority delegated by Congress (Act of May 3, 1802, ch. 53, 2 Stat. 195), approximately eleven years after the adoption of the first ten amendments. Congress thereafter amended the act incorporating the City of Washington but permitted the exemption to remain (Act of Feb. 24 1804, ch. 14, 2 Stat. 254). It seems a reasonable assumption that members of the Congress in the early years of the nineteenth century were personally familiar with the purposes and scope of the First Amendment, and did not regard the exemption as inconsistent therewith.

We turn to a consideration of reasons why the General Assembly of Maryland, within its legislative discretion, may have reasonably determined that the tax exemption here involved is for the general welfare, apart from any benefit that religious organizations derive from it. As *McGowan* makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is primarily secular, and if those secular purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the "establishment" clause is not violated.

It is not disputed that, today, religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services. If there could be a fair and practical division of the portions of church

owned properties devoted to the conduct of such secular activities, a proportionate tax exemption of the parts of the properties devoted to such uses could have been considered. But the practical administrative difficulties in such an apportionment are apparent, and courts cannot say that the expense and inconvenience involved would not be disproportionate to the revenue obtained. *Carmichael vs. Southern Coal & Coke Co., supra*, 301 U.S. at 511. If no exemption were given the religious organizations for the partial use of their properties for secular purposes, when charitable and other institutions which carry on similar work are granted exemption, serious questions of unconstitutional discrimination might arise.

Difficulties of another nature may be deemed inherent by the legislature if a tax were levied upon all or part of church properties. Attacks could be made upon the tax as a violation, not of the "establishment" clause, but of the "free exercise" provision. The arguments advanced by Temple Emanuel and the Maryland Synod of the Lutheran Church that any taxation of church owned property would contravene the "free exercise" clause have at least sufficient weight to be a legitimate motive for a legislative determination that the risk should not be run. See *Murdock vs. Pennsylvania*, 319 U.S. 105 (1943); *Follett vs. Town of McCormick*, 321 U.S. 573 (1944); *First Unitarian Church vs. County of Los Angeles*, 357 U.S. 545 (1958); *Mayor and City Council of Baltimore vs. A. S. Abell Co.* 218 Md. 273, 145 A. 2d 111 (1958). Compare *Grosjean vs. American Press Co.*, 297 U.S. 233, 250 (1936). Fear of constitutional restrictions is a proper consideration in a legislative exemption. See *Carmichael* at 513.

Apart from these considerations, there is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices, and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. Real estate developers are donating

sites to churches in their planned communities as part of the efforts to attract purchasers.[4] Columbia, a city projected to arise in Howard County between Baltimore and Washington, plans to have churches as well as supermarkets and office buildings as part of the community—obviously in the hope of attracting purchasers for the lots and houses. Anderson, *A Brand New City for Maryland*, Harper's Magazine, November 1964. The Baltimore Urban Renewal and Housing Agency, whose goal is the prevention and elimination of blight and slums, has invited churches, with other community groups and institutions, to share in the formulation of plans for project areas.[5] The increase in the general tax base through the building of houses and apartment houses by persons attracted by the presence of a church in the neighborhood is a governmental motive in no way connected with the support or establishment of religion.[6]

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[4] "The Danherst Corporation, which is building Fairless Hills (5,100 homes scheduled) * * * has donated four church sites based on surveys and studies and cleared through the Department of Research and Planning of the Philadelphia Council of Churches.

Levitt & Sons have donated 10 excellent sites to churches in Levittown (17,000 homes scheduled), in Bucks County, Pennsylvania. Levitt & Sons, themselves, chose the church sites and selected their donees.

Recently, Edmund N. Bacon, Executive Director of the Philadelphia City Planning Commission, incorporated 13 church sites in plans for the vast C-1 Housing Project for Northeast Philadelphia (15,000 homes proposed)." Halko, American City, March 1955, p. 7. See also, Leiffer, The Effective City Church, 126 (rev. ed. 1955).

[5] See Baltimore Urban Renewal Commissioners statement of Jan. 8, 1960, "Policy of the Baltimore Urban Renewal and Housing Agency in its Relationship with Churches", reprinted in City Church, Sept./Oct. 1960, p. 13.

[6] Church zoning cases which deal with the effect of permits for the building of houses of worship on immediately adjacent property are not here in point. For collections of and comments upon such zoning cases, see Curry, Public Regulation of the Religious Use of Land, 310-330 (1964) and cases therein cited. Note, Churches and Zoning, 70 Harv. L. Rev. 1428 (1957). Note, Church-State Religious Institutions and Values: A Legal Survey, 1958-59, 35 Notre Dame Law,

(Footnote continued on page 19A)

The object sought can not reasonably be deemed to be attainable with equal effect without the tax exemption of houses of worship.

We have found no case, federal or state, which holds that a tax exemption such as is here involved, confined to houses of worship, parsonages and the grounds appurtenant thereto and necessary therefor, violates the First Amendment or any other provision of the federal Constitution. Several cases, decided after *Everson*, have held to the contrary. *Lundberg vs. County of Alameda*, 46 Cal. 2d 644, 654, 298 P. 2d 1, *appeal dismissed* for want of a substantial Federal question, *sub. nom. Heisey vs. County of Alameda*, 352 U.S. 921 (1956), held that a provision of the California Revenue and Taxation Code granting a tax exemption to property used exclusively for school purposes of less than collegiate grade and owned by religious, hospital or charitable organizations, did not violate the "establishment" clause of the First Amendment. The court said:

> "* * * [I]t is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."

402, 405-11 (1960). The effect of the building of a church upon the values of adjacent property may be quite different from the stimulation to house buying and building in the community as a whole.

In Maryland, zoning laws generally permit the building of houses of worship in a residential zone without application for variance or special exception. Levy vs. Seven Slade, Inc., 234 Md. 145, 154, 198 A. 2d 267 (1964 — Baltimore County); Kaslow vs. Rockville, 236 Md. 159, 165, 202 A. 2d 638 (1964 — Rockville, Montgomery County). The Baltimore City Zoning Code does not exclude houses of worship and parsonages from the permitted uses in a residential area.

The opinion also referred to the history of tax exemptions to religious institutions. In *General Finance Corp. vs. Archetto,* — R. I. —, 176 A. 2d 73 (1961), *appeal dismissed* for want of a substantial Federal question, 369 U.S. 423 (1961), a taxpayer contended that he was assessed at a higher rate because of a tax exemption for buildings used for religious purposes and that the exemption violated the First Amendment; the court held the exemption constitutional. See also *Sisters of Holy Cross vs. Town of Brookline,* 347 Mass. 486, 497-98, 198 N.E. 2d 624 (1964) and *Fellowship of Humanity vs. County of Alameda,* 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).

We do not reach the question of whether, absent the tax exemption here involved, the taxation of church owned properties would violate the "free exercise" clause of the First Amendment. For the reasons set forth, we hold that the exemption does not violate the "establishment" clause, and is constitutional.

Decree affirmed; costs to be paid by appellants.

Mandate of the Court of Appeals of Maryland

No. 189, September Term, 1965

Appeal from the Circuit Court No. 2 of Baltimore City.

Filed: June 21, 1965.

February 14, 1966; Decree affirmed; costs to be paid by appellants. Opinion by Oppenheimer, J.

February 25, 1966: Motion for reargument filed.

March 2, 1966: Motion denied.

STATE OF MARYLAND, Sct.:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this sixteenth day of March A. D. 1966.

/s/ JAMES LLOYD YOUNG

Clerk of the Court of Appeals of Maryland.

Motion for Reargument

* * * * * *

That the Opinion of this Honorable Court filed February 14, 1966 in the within cause, appears to have taken judicial notice of certain matters not in evidence, and the said Opinion was based in substantial part upon said matters, namely: that churches engage in certain beneficial public welfare activities of a secular nature, and it was apparently concluded by this Honorable Court, that these activities are inseparable from the religious activities of said churches. . . .

The Intervening Appellants believe that if such be the case, it is true to greatly varying degrees, such public activities being nearly non-existent in the case of some churches, and yet being in no case more than a minority proportion of the activities of any church; and the Intervening Appellants believe that they could show on remand, by budgetary analyses as well as by expert and non-expert testimony, that nearly all of the activities of churches are proportionally separable into categories religious and secular; that the proportions and degrees of such activities are not only demonstrable, but are most significantly pertinent to the issues in this case. . . .

In any event the Intervening Appellants urge that the questions alluded to above represent substantial important the court to remand . . . for only by so doing and by permitting the introduction of additional evidence upon the matters mentioned, it is respectfully urged, can the substantial factual merits of the case, by fully reached and analyzed. . . .

* * * * * *

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1311~~ 133

MADALYN E. MURRAY, Trustee and LEDDIE MAYS,
Petitioners,

v.

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of Maryland; ALBERT W. WARD, Director, State Department of Assessments and Taxation; ROBERT L. MAINEN, Supervisor of Assessments of Baltimore City; and JOHN G. ARTHUR, Director of Assessments for Baltimore City; THE MOST REVEREND LAURENCE J. SHEHAN, Roman Catholic Archbishop of Baltimore, a Corporation Sole; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE; and MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

MARTIN J. SCHEIMAN
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1271 Avenue of the Americas
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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

MADALYN E. MURRAY, Trustee and LEDDIE MAYS,
Petitioners,

v.

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of Maryland; ALBERT W. WARD, Director, State Department of Assessments and Taxation; ROBERT L. MAINEN, Supervisor of Assessments of Baltimore City; and JOHN G. ARTHUR, Director of Assessments for Baltimore City; THE MOST REVEREND LAURENCE J. SHEHAN, Roman Catholic Archbishop of Baltimore, a Corporation Sole; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE; and MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Maryland in the within action, dated and entered February 14, 1966, affirming the decree of the Circuit Court

No. 2 of Baltimore City, entered on December 14, 1964, dismissing the complaint herein. On March 2, 1966, the said Court of Appeals made an order, entered said day, denying an application for a reargument of the appeal filed by Lemoin Cree, Marie Cree, his wife, and Freethought Society of America, who had become Intervening Plaintiff-Appellants in said action, as related below.

Opinions Below

The opinion of the Court of Appeals of the State of Maryland (Appendix I, *infra*, p. 1a) is reported in 241 Md. 383. The opinion of Circuit Court No. 2 of Baltimore City (Appendix II, *infra*, p. 22a) is not officially reported.

Jurisdiction

Jurisdiction of this Court is conferred by 28 U. S. C. §1257 (3).

Questions Presented for Review

1. Whether Article 81, §9(4) of the Maryland Code, providing for the exemption of houses and buildings used for public worship from assessment, and from state, county and city taxation, violates the 1st Amendment to the Constitution of the United States, made applicable to the States by the 14th Amendment thereof, as an unconstitutional law respecting an establishment of religion or prohibiting its free exercise.

2. Whether said Article 81, §9(4) of the Maryland Code denies petitioners equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

3. Whether said Article 81, §9(4) of the Maryland Code, as interpreted and applied to the facts of this case by Circuit Court No. 2 of Baltimore City and by the Maryland Court of Appeals, has resulted in depriving petitioners of due process of law and equal protection of the laws guaranteed to them by the 14th Amendment to the Constitution of the United States.

Constitutional Provisions and Statute Involved

The 1st and 14th Amendments to the United States Constitution are involved, the provisions of which are as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (1st Amendment.)
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment.)

The sole statute involved is §9 of Article 81 of the Maryland Code (The Annotated Code of Maryland, Vol. 7, 1965 Replacement Volume), and particularly subdivision (4) thereof. The entire statute is set forth in Appendix III hereof. The provisions of said statute directly applicable to this case read as follows:

> "§9. *Exemptions.*
>
> "The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:
>
> * * *
>
> "(4) Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof."

Statement of the Case

Petitioners and other plaintiffs brought this taxpayers' suit on their own behalf, and on behalf of all other taxpayers similarly situated, against the Comptroller of the Treasury of Maryland, the Director of the Maryland State Department of Assessment and Taxation, and the Supervisor and Director of Assessments of Baltimore City as defendants, seeking a declaratory judgment and injunctive relief based upon the contentions that Article 81, §9(4) of the Maryland Code and the acts and practices performed and conducted by defendants thereunder amounted to state support of religion and deprived petitioners and others

similarly situated of certain privileges under the Declaration of Rights contained in the Maryland Constitution and constituted violations of the 1st and 14th Amendments to the Constitution of the United States.

So far as is material here, petitioners' complaint alleged that their real estate, and that owned by others similarly situated in Maryland, bore higher tax burdens than would otherwise have been imposed but for the exemption from taxes granted to the owners of houses and buildings used for public worship in Maryland pursuant to Article 81, §9(4) of the Maryland Code, and that the taxes collected from them and from those in their position were resultingly higher as a consequence of such exemptions.

Circuit Court No. 2 of Baltimore City allowed Lemoin Cree, Marie Cree, his wife, and Freethought Society of America to intervene as additional parties plaintiff, and five religious bodies, comprising the Roman Catholic Archbishop of Baltimore, The Convention of the Protestant Episcopal Church of the Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore and Maryland Synod of the Lutheran Church in America were permitted to intervene as parties defendant.

A hearing was conducted on June 1, 1964 before Circuit Court No. 2 in Baltimore, which found that petitioners' contentions outlined above were correct to the extent that they and others similarly situated had been subjected to higher taxes as a consequence of the exemptions accorded houses of worship; that petitioners' action as a class suit was proper; and that they and the other inter-

vening plaintiffs had a standing to sue (Appendix II, *infra,* pp. 38a-41a). Said court nevertheless held that the rights of petitioners and the intervening plaintiffs under the Maryland Constitution's Declaration of Rights had not been violated and that the acts complained of did not offend the provisions of the 1st and 14th Amendments to the United States Constitution.

In disposing of the major Federal question presented, concerning the 1st Amendment, the Baltimore Circuit Court recognized it as "interesting and provocative" (Appendix II, *infra,* p. 49a), but ruled that the tax exemption in favor of houses of worship was justified under the principle of "government neutrality" in matters of religion (Appendix II, *infra,* p. 52a), and concluded that the charged tax exemption "does not result in the establishment of religion or in state action prohibiting the free exercise thereof" (Appendix II, *infra,* p. 54a).

Upon appeal, the Court of Appeals of Maryland affirmed the decree of the Circuit Court. In so ruling, it acknowledged that the tax exemptions allowed houses of worship were the equivalent of direct grants to those sectarian establishments (Appendix I, *infra,* p. 15a), expressed the view that any exemption statute that was primarily secular in purpose and effect would not offend the 1st Amendment "establishment" clause (Appendix I, *infra,* p. 18a) and, pronouncing that a "major part of" the functions of "religious organizations" was the conduct of "activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial in-

equalities" (Appendix I, *infra*, p. 18a), concluded that no constitutional violation existed. In reaching that conclusion, the Maryland court paid no heed to the fact that the statute involved mandates its own strict construction and extends its narrow exemption only to houses and buildings "used *exclusively* for public worship". Thus, the court plainly ignored the fact that any attribution of secular activities to such religious buildings tends to destroy rather than enhance the scope of the statute's limited exemption grant. Moreover, the court's determination that a "major part" of the functions of religious organizations is secular in quality was totally unwarranted, first, because no evidence of any kind on that subject was in the record before it, and second, because the very notion itself is inconsistent with the axiomatic proposition that the major function of religious institutions is to serve religious needs and disseminate religious doctrine. The Maryland court's conclusion is further disturbing because, although the court derived its "secular function" argument from the supposed extensive non-religious activities of religious "organizations", it applied its argument so as to exempt all the neighborhood churches and synagogues involved in the case from taxation. "Houses of public worship", not "religious organizations", are the subject of the tax exemption statute, and the professed substantial scope of secular activities conducted by "religious organizations" surely does not warrant the inference that the scattered individual buildings used as "houses of worship" throughout Maryland are similarly engaged in equivalent secular programs.

Manner in Which Federal Questions Were Raised

The Federal questions relating to the 1st and 14th Amendments to the United States Constitution were raised by petitioners' pleading in the action herein, and were specifically set forth in their Interlineated Amended Bill of Complaint in subdivision "(d)" and "(e)" of paragraph "7" thereof (Certified Transcript of Record below, p. 38). Said questions were specifically considered by both the Baltimore Circuit Court and the Maryland Court of Appeals. The lower court's opinion contains lengthy discussions of both the 14th (Appendix, *infra,* pp. 45a-49a) and the 1st Amendment contentions (Appendix, *infra,* pp. 49a-56a). The said Circuit Court denied petitioners' claims of Federal unconstitutionality respecting the 14th Amendment in its Memorandum Opinion where it stated (Appendix, *infra,* p. 45a):

> "The exemption does not violate the Fourteenth Amendment to the Constitution of the United States prohibiting a State from denying citizens of the United States, life, liberty, or property without due process of law."

and similarly denied petitioners' charges relating to the 1st Amendment, by declaring (Appendix, *infra,* p. 49a):

> "The exemption does not violate the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, prohibiting Congress (and now the General Assembly of Maryland) from making any law "respecting an establishment of religion or prohibiting the free exercise thereof."

The Maryland Court of Appeals affirmed the lower court's ruling regarding the 14th and 1st Amendments' contentions, stating with respect to the former (Appendix, *infra*, p. 12a):

> "The statements in *Gibbons* and *Bell's Gap* as to the validity of exemptions of church property from taxation are dicta, and in neither case was the applicability of the First Amendment, through the Fourteenth, considered. Apart, however, from the possible impact of the First Amendment, it is evident to us that, under the subsection, all organizations having beliefs about religion are treated uniformly as a class, and that the exemption here involved does not violate the equal protection clause."

and with respect to the latter (Appendix, *infra*, p. 21a):

> "We do not reach the question of whether, absent the tax exemption here involved, the taxation of church owned properties would violate the 'free exercise' clause of the First Amendment. For the reasons set forth, we hold that the exemption does not violate the 'establishment' clause, and is constitutional."

Reasons for Granting the Writ

Novel questions of grave importance are involved which have never before been ruled upon by this Court. A problem relating to the fundamental principle of church and state separation is presented by the issues in the case, namely, whether exemption from state, county and city taxation accorded to houses of worship under Maryland law amounts to support of religion in violation of the 1st and 14th Amendments to the Constitution. The subject is one of wide general interest and importance, and has been

earnestly debated, discussed and written about extensively in recent years. Mr. Justice Barnes of the Maryland Circuit Court reflected his recognition of the significance of petitioners' arguments by writing a lengthy opinion that extends over 35 printed pages of the Appendix hereto. He himself characterized the challenge of the 1st Amendment questions presented as "interesting and provocative" (Appendix, *infra*, p. 49a). Mr. Justice Oppenheimer of the Maryland Court of Appeals also wrote a lengthy opinion herein, professedly founded upon "broad guide lines" found in earlier opinions of this Court. The learned Justice nevertheless pointed out that although individual Justices of this Court have intimated their positions and personal opinions on the subject matter of this case, the basic questions involved had never been ruled upon by this Court, stating (Appendix, *infra*, p. 14a):

> "* * * we agree with counsel that in no case has the Supreme Court given an opinion on, or in specific terms discussed the constitutionality of tax exemptions of religious organizations."

It is respectfully submitted that the highly controversial issues involved in the case at bar deserve the full consideration of this Court upon appeal, so that the prevailing uncertainties relating to its inherent constitutional problems may be dissipated and finally resolved.

The decision of the Maryland Court of Appeals appears to be in conflict with the pronouncements of this Court in *Everson* v. *Board of Education*, 330 U. S. 1, and in *Abington School District* v. *Schempp*, 374 U. S. 203 and, particularly, with the constitutionality test enunciated by

Mr. Justice Clark in the majority opinion of this Court in the *Abington* case. There, the learned justice established the applicable principles for determining whether or not a statute violates the "establishment" provision of the 1st Amendment in the following language (374 U. S. 203, p. 222):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Application of the above-quoted testing principles to the case at bar convincingly demonstrates the error committed by the Maryland courts. In the first place, it seems quite incongruous to suggest that the statute under consideration may be deemed one designed to achieve a "secular" purpose when the exemption granted is unequivocally limited to buildings used "exclusively" for religious purposes. Accordingly, the statute fails to meet the first criterion necessary for its validity under Mr. Justice Clark's test. But even if "some" secular purpose is attributed to the statute, the enactment cannot survive the second criterion of the test, for it is obvious that the "primary" effect of the tax exemption must necessarily be to advance the "primary" function of the buildings affected—and that "primary" function cannot be anything other than a religious one, unless the bizarre notion that houses of worship are more secular than religious in purpose is adopted.

Inasmuch as the Maryland statute has its counterpart or rough equivalent in every state in this country, the determination made by the Maryland courts in the present case, if erroneous as claimed, will tend to perpetuate a grievous impact upon millions of real property owners throughout the United States, all of whom are now obliged to pay real estate taxes, some portion of which would manifestly not be charged to them but for the exemptions granted to lands and buildings used for houses of worship. The rising costs of government being what they are, and the ever-present problems of financing such costs through taxation becoming increasingly difficult to solve, it would appear to be only fair and reasonable to impose such taxes upon all who derive benefit from the services and protections extended to real property by the various local governments and their agencies. While the outlawing of tax exemptions presently granted to religious establishments would involve departures from time-honored practices on the subject, a more equitable allocation of the public tax burden would thereby be accomplished, and the venerable principle of separation of church and state given its full and proper expression. The practice of religion and the financing of its costs would then be left to congregations of worshipers everywhere, where it deservedly belongs, as this Court has proclaimed.

Judgment of the State Court

The Final Decree of the Circuit Court No. 2 of Baltimore City is annexed hereto (Appendix, *infra,* p. 80a). Said Decree was affirmed on February 14, 1966 by the opinion of the Maryland Court of Appeals (Appendix, *infra,* p. 1a).

Conclusion

For the reasons expressed herein, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York, May 11, 1966

MARTIN J. SCHEIMAN
Attorney for Petitioners

APPENDIX I

Opinion of the Court of Appeals of Maryland

(February 14, 1966)

OPPENHEIMER, J.

Maryland's statutory exemption from state, county and city taxation of structures used exclusively for public worship and any parsonage and grounds appurtenant thereto is attacked as violative of the Declaration of Rights of the Maryland Constitution and of the First and Fourteenth Amendments to the Constitution of the United States. The question is raised by a taxpayers' suit filed by Mrs. Murray as trustee and Mrs. Mays, as taxpayers and citizens of Maryland, on their own behalf and on behalf of all other taxpayers similarly situated, in the Circuit Court No. 2 of Baltimore City. Mr. and Mrs. Lemoin Cree, residents and taxpayers in Frederick County, and Freethought Society of America, an Ohio corporation which owns real estate in Baltimore City, were permitted to intervene as additional parties plaintiff. The defendants are the Comptroller of the Treasury of Maryland, the State Director of Assessments and Taxation, the Supervisor of Assessments of Baltimore City and the Director of Assessments for Baltimore City. The court below permitted five religious bodies to intervene as parties defendant: the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church in The Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America.

The statute attacked as unconstitutional is Code (1965 Repl. Vol.) Art. 81, Section 9(4) which reads as follows:

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"§9.—*Exemptions.*

The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemption shall be strictly construed:

* * *

"(4) *Churches, parsonages, etc.*—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof."

At the time the suit was filed, there were 57 items of exempt property set forth in Section 9, including the buildings and grounds of hospitals, charitable institutions, educational and literary institutions, nonpolitical clubs and Boy and Girl Scouts.[1]

Mrs. Murray, one of the original plaintiffs,[2] and Mr. Cree, an intervening plaintiff, are atheists. Mrs. Murray as trustee and Mrs. Mays, the original plaintiffs, own property in Baltimore City on which, in 1964, they paid taxes of $353.50. Mr. Cree is a Research Analyst in Micro-biology at Fort Detrich, in Frederick County. He and his wife own about two acres of land in that county upon which they paid taxes, in 1964, to the county and State of Maryland in the amount of $40. The Freethought Society of America, Inc. publishes the "American Atheist", a monthly magazine. It owns a building in Baltimore upon which taxes were paid, in 1964, in the amount of $350.09.

1. At the present time, there are 60 categories of exempted property. Code (1965 Repl. Vol.) Article 81, Section 9.

2. Mrs. Murray was not in the State at the time of the hearing below and did not testify. Her beliefs about religion, however, are set forth in Abington School Dist. v. Schempp, 374 U. S. 203 (1963) and Murray v. Burns, 405 P. 2d 309 (Haw. 1965).

Appendix I

The plaintiffs-appellants contend that the exemptions granted under Subsection 9(4) of the Maryland statute violate Articles 15, 23 and 36 of the Maryland Declaration of Rights; that they are in violation of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution; and are in violation of the First Amendment to the Constitution made applicable to the states through the Fourteenth. The defendants-appellees maintain that the exemptions are constitutional under both the Maryland Declaration of Rights and the federal Constitution. The appellee Temple Emanuel contended below and contends here that the taxation of property used for worship would unconstitutionally abridge the free exercise of religion protected by the First Amendment. The Maryland Synod of the Lutheran Church joins in this contention in this appeal. All of the appellees contend further that the appellants do not have standing to bring the suit.

At the hearing below, it was shown that the records of Baltimore City indicate the total assessable basis of the city for 1964 as follows:

All taxable real property	$2,263,708,768.00
All tax exempt property	578,997,400.00

The approximate total assessments exempt from taxation in the City in the levy for 1964 under the statutory provision here involved was as follows:

Protestant	$41,031,430
Roman Catholic	31,339,880
Jewish	6,136,510

The Chancellor found that the total assessed value of real estate in Baltimore City exempt from taxation under Article 81 Section 9 is over 20% of the total assessed value of all real estate in Baltimore. The exemption under the subsection here involved is approximately 2.8% of the total

assessed value of all Baltimore City real estate and approximately 13½% of the total assessed value of tax exempt real estate in the City. The state tax rate, levied to protect the bond issues of the State, is fifteen cents for $100 of assessed value.

It was agreed that the Roman Catholic Archbishop of Baltimore is a corporation having title to various properties of the Roman Catholic Church of Baltimore City, including 163 parishes or mission churches with an aggregate value of Diocesan properties in excess of $2,000,000. The Maryland Synod of the Lutheran Church owns property in Baltimore City in excess of $13,600,000. Temple Emanuel is a Reform Jewish Congregation whose synagogue is in Baltimore City.

At the hearing, Mr. John G. Arthur, Director of the Department of Assessments of Baltimore City, who has been with that department for 38 years, testified for the appellants. His testimony as to applying the statutory exemption was summarized by Judge Barnes as follows:

> "In applying this exemption, Mr. Arthur and the City Department of Assessments have given the words 'public worship' a comprehensive interpretation. Houses, buildings and appurtenant lands used for teaching or contemplating the beliefs of *any* philosophical system regardless of whether that philosophical system includes a belief in a Supreme Being, are considered to be exempt under Section 9(4) and such exemptions are granted in the regular course of administering the tax laws. For example, the property used by the Baltimore Ethical Culture Society which does not teach any belief in a Supreme Being, but which confines its teachings to moral and ethical standards and educational purposes has been exempted under Section 9(4). Property used by

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Buddhist organizations for their religious teachings are exempted. The Philosophical College of Occult Science has had its property exempted under Section 9(4). Over objection and subject to exception, Mr. Arthur testified that after having heard Mr. Cree describe his philosophical system, if application were made, the property of the Freethought Society would be granted an exemption under Section 9(4)."

The Chancellor also found that the real property of churches not used for houses of worship and parsonages, but held for other use and for future construction of church edifices is subject to real estate taxation to the same extent as similar property held by private persons.

At the conclusion of the case below, Judge Barnes, in a comprehensive opinion, found that the plaintiffs-appellants had standing to sue but that the statutory exemption here involved did not violate the Maryland Declaration of Rights or the federal Constitution. In this appeal from his decision, we shall first consider the standing of the appellants to sue, then the questions raised under the Maryland Declaration of Rights and, finally, the issues under the federal Constitution.

The Appellants' Standing to Sue

In Maryland, taxpayers have standing to bring suit to challenge the constitutionality of a statute when the statute as applied increases their taxes. *McKaig* v. *Mayor and City Council of Cumberland*, 208 Md. 95, 102-103, 106, 108, 116 A. 2d 384 (1955) and cases therein cited. If the taxpayers cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to challenge it. *Citizens Comm.* v. *County Comm'rs. of Anne*

Arundel County, 233 Md. 398, 401-405, 197 A. 2d 108 (1964) and cases therein cited.

A class suit is here involved. Under Section 9(4) over $78 million dollars of real estate is exempted from taxation out of a total assessment basis of Baltimore City of over $2 billion. The class of taxpayers represented by the appellants, other than the Crees, would pay less real estate taxes to the City if the exemption were not in effect. The property owners who pay real estate taxes to the state, represented by all the appellants, would pay less taxes to the state if the exempted property were taxed.

The appellees rely on statements in *Citizens Committee* that the appellants there had failed to show any special damage or loss peculiar to themselves as taxpayers or otherwise, and that, to have standing, the persons who bring the suit must show a special interest in the subject matter distinct from that of the general public. In *Citizens Committee,* the appellants had filed suit as citizens and taxpayers to challenge the constitutionality of local laws and resolutions authorizing the operation of gambling devices in Anne Arundel County. The Court found it evident that the taxpayers would be damaged by a discontinuance of the program rather than a continuance of it. Here, the converse is true.

The appellees further contend that, even if the appellants have standing to sue under the Maryland law, they lack standing under the federal law to attack the constitutionality of the statute under the federal Constitution. We do not agree. When the validity of a state statute is attacked in a state court, it is the duty of that court to determine all the constitutional issues involved, federal as well as state. If the statute is held valid under the state law, but invalid under the federal Constitution, the state court must give the complainants the relief they pray. The appellants have elected to raise the federal Constitutional

questions in a state court, as they had the right to do. If they have standing under the law of Maryland to bring the suit, it is irrelevant that the result might have been different had the action been instituted in a federal court.

The appellants had standing to bring the suit in Maryland courts, and, in their suit, to raise any constitutional question in respect of the statute, state or federal.

The Provisions of the Maryland Declaration of Rights

The appellants contend that the subsection of the statute is unconstitutional under Articles 15, 23 and 36 of the Maryland Declaration of Rights. Article 15 provides that all taxes for the support of the state and local governments shall be uniform. Article 23 states that no man shall be deprived of life, liberty or property except by the law of the land, which, this Court has held, is the equivalent of due process of law. Article 36 deals with religious freedom; it provides, in part, that no person ought to be compelled to maintain or contribute to maintain any place of worship or any ministry.

This Court has consistently recognized the power of the legislature to grant full exemptions from taxation when reasonable and for a public purpose. *State Tax Com'n.* v. *Gales,* 222 Md. 543, 548-550, 161 A. 2d 676 (1960) and authorities therein cited. When made for such a purpose and uniformly applied, the exemption does not violate Article 15 of the Declaration of Rights (even before the 1915 amendment when uniformity was required with regard to assessment as well as with regard to tax rates) or due process of law under Article 23. *National Can Corp.* v. *Tax Com'n.,* 220 Md. 418, 153 A. 2d 287 (1959); *State Tax Com'n.* v. *Gales, supra.* See also *Armco Steel Corp.* v. *State Dept. of Assessments and Taxation,* 236 Md. 168, 175-176, 202 A. 2d 741 (1964).

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Williams v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 41 (1933) involved the validity of a Maryland statute under which the property of a particular railroad was made exempt from taxation. The cities of Baltimore and Annapolis challenged the validity of the exemption. The District Court upheld the validity of the statutory exemption, the Circuit Court reversed, and the Supreme Court reversed the Circuit Court. In delivering the Supreme Court's opinion, Mr. Justice Cardozo held that the municipal corporations, being creations of the state, were without standing to invoke the protection of the federal Constitution but that the statute was valid under Article 15 of the Maryland Declaration of Rights. He said:

> "The courts of Maryland hold that the rule of uniformity established by these provisions does not forbid the creation of reasonable exemptions in furtherance of the public good * * * It does not even prohibit an exemption in favor of an individual as distinguished from one for the benefit of the members of a class. All that it exacts in respect of the narrower exemption is the presence of a relation, fairly discernible, between the good of the individual and the good of the community."

General tax exemptions for property dedicated to religious uses have long been regarded in Maryland as reasonable and for a public purpose. The Chancellor succinctly gave the history of tax exemption of houses of worship in Maryland as follows:

> "An exemption from taxation similar to that granted by Section 9(4) has existed in Maryland since the State began the general taxation of real estate by the Act of 1797, Chapter 89, passed on January 20, 1798. The exemption in that Act was: 'ex-

> cept property belonging to the State or the United States, houses for public worship, burying grounds * * *'. This basic exemption has continued in each tax statute adopted in Maryland since the original Act of 1797, Chapter 89 until the present time."

Concurrently with this continuous exemption, Maryland has had in effect another measure, Article 38 of the Declaration of Rights, directed to the separation of church and state. That Article requires the sanction of the General Assembly for any gift, sale or devise of land "for the support or benefit of any Religious Sect, Order or Denomination * * *; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, * * *" for a house of worship, a parsonage, or burying ground.

In *Vansant* v. *Roberts*, 3 Md. 119, 128-29 (1852), the Court considered the purpose of this Article. Judge Mason, for the Court, said:

> "The 34th section of the Bill of Rights is analogous to the British *statutes of mortmain*, which were introduced to check or prevent ecclesiastics from accumulating in perpetuity, in *mortua manu*, or hands that never die, the lands or property of the kingdom, and thereby withdrawing them from public and feudal charges. This provision in our Bill of Rights, was designed for the protection or benefit of the people of Maryland from similar evils, * * *"

In 1948, by constitutional amendment, Article 38 was changed so as not to require the sanction of the General Assembly to a gift, sale or devise to a religious organization, but the legislature was given the right to require such sanction by statute. While the ownership of land by a religious organization has been consistently circumscribed by constitutional provision, therefore, gifts or devises for

houses of worship and parsonages have been permitted, in the same Article, without legislative sanction.

Baltimore City v. *Starr Church*, 106 Md. 281, 286, 67 Atl. 261 (1907) held that a special act of the legislature granting exemption for a specific property owned by a church of one denomination was unconstitutional, because it violated Articles 15 of the Declaration of Rights and Article III, Section 33 of the Maryland Constitution. However, Judge Rogers, for the Court, had this to say as to the validity of the statutory exemption from taxation of houses used for public worship:

> "It will not be denied at this late day that the Legislature has the power, *within reasonable limits*, to exempt certain *species* or *classes* of property from taxation, when the *public interests* so require. This is actually done in the case of houses used exclusively for public worship, and the grounds appurtenant thereto, in the case of graveyards and cemeteries, and in the case of hospitals, asylums and benevolent institutions. (Code, 1904, Art. 81, sec. 4). The validity of provisions of this kind is too well established to be now questioned. But it will be perceived in these cases *all* the property of the *class* indicated is exempted. The Legislature does not exempt *some* houses of public worship and tax others. It does not exempt *some* graveyards and cemeteries, *some* hospitals, and then tax other properties of exactly the same kind. It does not arbitrarily say that *this* particular house of public worship shall be exempt, but *that* one shall be taxed. On the contrary, *all* property falling within any one of the classes mentioned in Sec. 4, is exempt. There is therefore no arbitrary discrimination between different properties of the same kind, but all are treated alike."

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Occasionally a dictum, when it strikes a note resonant with accepted legal principle, becomes as important as the actual decision. This has been the case in *Starr*. The statement quoted has been cited with approval as late as *State Tax Com'n.* v. *Gales, supra.*

The exemption here involved violates no provision of the Maryland Declaration of Rights.

The Equal Protection Clause of the Fourteenth Amendment

The appellants contend that by the exemption here involved, the State of Maryland has deprived them of the equal protection of the law guaranteed by the Fourteenth Amendment and that the criterion for the distinction is discriminatory and not justifiable under the Amendment.

The Supreme Court has repeatedly held that state exemptions of a class from taxation not clearly unreasonable do not infringe the equal protection clause. In *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509 (1937), Mr. Justice Stone said, for the Court:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation."

In *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407-08 (1886), Archbishop Gibbons had appealed from a decree dismissing his bill in equity which claimed that the assessment and tax on lots owned by a Catholic church in the City of Washington were in violation of an Act of Congress which exempted from taxation church buildings and grounds actually occupied by such buildings. A similar exemption had been in effect under authority delegated

by Congress as early as 1802. The lots in question, the Court found on the uncontroverted facts, were unnecessary for the enjoyment of the church and were to be sold or leased. The Court held that under the circumstances, the lots were not exempt from taxation. However, Mr. Justice Gray, in delivering the Court's opinion, said that the power of Congress functioning as a local legislature for the District of Columbia to levy taxes for District purposes only "in like manner as the legislature of a State may tax the people of a State for State purposes" was clear and that "[i]n the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237 (1890), the Court said:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

The statements in *Gibbons* and *Bell's Gap* as to the validity of exemptions of church property from taxation are dicta, and in neither case was the applicability of the First Amendment, through the Fourteenth, considered. Apart, however, from the possible impact of the First Amendment, it is evident to us that, under the subsection, all organizations having beliefs about religion are treated uniformly as a class, and that the exemption here involved does not violate the equal protection clause.

Appendix I

The First Amendment

The appellants contend that the "establishment" clause of the First Amendment, made applicable to the states through the Fourteenth, prohibits indirect subsidies to religious organizations by tax exemption as clearly as it makes invalid any tax levied directly to support such organizations. The appellees Temple Emanuel and the Maryland Synod of the Lutheran Church take the position that, even without the statutory exemption, the "free exercise" clause of the First Amendment would make the taxation of the property of houses of worship unconstitutional. The other appellees maintain that the tax exemption is not within the category of governmental "establishments" proscribed by the Constitution, but is a permissible "accommodation" to religion which the government may, in pursuit of its policy of neutrality, grant to religious institutions in the same manner in which it grants similar exemptions to secular charitable institutions.

The Supreme Court of the United States has firmly established that the Fourteenth Amendment makes the First Amendment applicable to the states. *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961) and cases cited in footnote 5; *Torcaso* v. *Watkins*, 367 U. S. 488, 492 (1961); *Sherbert* v. *Verner*, 374 U. S. 398, 402 (1963). The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" It was not until 1947 that the nature of the "establishment" clause was discussed in depth by the Supreme Court. *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Since *Everson*, there have been a number of decisions of that Court involving the "establishment" clause. The holdings of these cases are too well-known, their purport has been too widely discussed, and views of the individual Justices too often quoted and analyzed for us

again to survey familiar ground. There are intimations or even expressions of opinions by individual Justices on the questions here involved, but we agree with counsel that in no case has the Supreme Court given an opinion on or in specific terms discussed the constitutionality of tax exemptions of religious organizations.

In our reading of the opinions, however, we find broad guide lines which form the frame within which the case before us is to be considered. We are a religious people and recognize the effect religious institutions have on human activity. The First Amendment was designed to erect "a wall of separation between church and State." Mutual independence, under our Constitution, is deemed best for the State and best for religion. The State cannot forbid nor can it perform or aid in performing the religious function. Like other broad constitutional concepts, the meaning of "separation" is to be ascertained in the application of the principle to specific cases. A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.

In the consideration of the impact of the "establishment" clause upon the tax exemption here involved, some conclusions are evident. By granting the exemption to church properties, Maryland does not support all religious bodies or any of them in the sense that the state espouses their acceptance or the acceptance of any of them by its

citizens. The exemption goes, not only to all church owned properties, but to all properties owned by any organization which has definite views about religious beliefs, including religions such as Buddhism and organizations such as the Ethical Society, which do not believe in a Supreme Being. The property of the Freethought Society, one of the appellants, an atheistic organization, would be entitled to the exemption if it asked for it. In Maryland, tax exemption is by no means synonymous with approval of the purposes of the body whose property is exempt. The property of charitable organizations is one of the 57 exempted categories. In *Register of Wills for Baltimore City* v. *Cook,* (No. 145, Sept. Term 1965) decided February 3, 1966, we held that bequests creating trusts to be used, among other purposes, for the passage of the Equal Rights Amendment, to remove alleged discriminations against women, were entitled to exemption from collateral inheritance tax because the bequests were charitable in nature. If the funds left by the testatrix were used, in part, for the erection of a building for the administration of the trusts, the property would be exempt under Article 81, Section 9(7); but the exemption would not mean that Maryland favors the passage of the amendment.

Indubitably, religious organizations benefit from the exemption. Economically, they are in the same position as though they paid taxes to the city and state and then received back the amounts paid in the form of direct grants. Moreover, members of the general public pay higher taxes than they would if the exemptions were not in effect; the same amount of revenue must be raised and, by reason of the exemption, the rate paid by non-exempt taxpayers is higher.

To the appellants, this conclusion is the end of the case. They submit that the First Amendment forbids any appropriation of public funds to support religious organizations;

that the effect of the exemption is the same as that of a direct appropriation; that the "establishment" clause bars not only laws establishing a church or sect, but any law respecting an establishment of religion; and that the Maryland statutory exemption is such a law, because the State cannot do indirectly what it cannot do directly. Logically, this argument is strong. But, as this Court has said before, logic is a minion of the law, not its master. The question before us involves the power of a state to legislate for the general welfare as well as the constitutional prohibition, the assay of legislative motives, the weighing of economic factors apart from pecuniary benefit to religious organizations, and the historic attitude of the states and federal government towards the interpretation of the separation concept. Judicial duties wold be easier if constitutional problems could be solved by logical theorems.

That the states do not believe tax exemption of the property of religious institutions violates any constitutional prohibition is evident. Constitutional or statutory provision for such exemption exists today in every state and the District of Columbia.[3] "This history cannot be explained solely as a carryover from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices." Kauper, *The Constitutionality of Tax Exemptions for Religious Activities* in "The Wall Between Church and State", 95, 110 (Oaks ed. 1963).

3. Note, Constitutionality of Tax Benefits Accorded Religion, 49 Colum. L. Rev. 968 (1949); and Van Alstyne, "Tax Exemption of Church Property", 20 Ohio St. L. J. 461 (1959); Alaska and Hawaii, the last two states to be admitted to the Union, have similar exemptions. Alaska Const. Art. IX, sec. 4; Rev. Laws of Hawaii 1955 (1961 Supp.) ch. 128-18.

It is true that the protection of individual rights guaranteed by the federal Bill of Rights is not dependent upon majority approval. It is also true that the historical argument, while it casts some light, is not conclusive. *Compare Brown* v. *Board of Education*, 347 U. S. 483, 489 (1954), *with McGowan* v. *Maryland*, 366 U. S. 420, 440-42 (1961). Nevertheless, in the words of Mr. Justice Holmes, "(i)f a thing has been practical for two hundred years, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922). It is significant, in our opinion, that the act exempting church property in the District of Columbia from taxation (the successor of which was before the Court in *Gibbons* v. *District of Columbia, supra*) was first adopted in 1802 by the corporation of the City of Washington (Act of Oct. 6, 1902, ch. 5, Washington City Laws 1802-03) under authority delegated by Congress (Act of May 3, 1802, ch. 53, 2 Stat. 195), approximately eleven years after the adoption of the first ten amendments. Congress thereafter amended the act incorporating the City of Washington but permitted the exemption to remain (Act of Feb. 24, 1804, ch. 14, 2 Stat. 254). It seems a reasonable assumption that members of the Congress in the early years of the nineteenth century were personally familiar with the purposes and scope of the First Amendment, and did not regard the exemption as inconsistent therewith.

We turn to a consideration of reasons why the General Assembly of Maryland, within its legislative discretion, may have reasonably determined that the tax exemption here involved is for the general welfare, apart from any benefit that religious organizations derive from it. As *McGowan* makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is primarily secular, and if those secular purposes could not reasonably be deemed achievable

without an incidental benefit to religious organizations, the "establishment" clause is not violated.

It is not disputed that, today, religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services. If there could be a fair and practical division of the portions of church owned properties devoted to the conduct of such secular activities, a proportionate tax exemption of the parts of the properties devoted to such uses could have been considered. But the practical administrative difficulties in such an apportionment are apparent, and courts cannot say that the expense and inconvenience involved would not be disproportionate to the revenue obtained. *Carmichael* v. *Southern Coal & Coke Co., supra,* 301 U. S. at 511. If no exemption were given the religious organizations for the partial use of their properties for secular purposes, when charitable and other institutions which carry on similar work are granted exemption, serious questions of unconstitutional discrimination might arise.

Difficulties of another nature may be deemed inherent by the legislature if a tax were levied upon all or part of church properties. Attacks could be made upon the tax as a violation, not of the "establishment" clause, but of the "free exercise" provision. The arguments advanced by Temple Emanuel and the Maryland Synod of the Lutheran Church that any taxation of church owned property would contravene the "free exercise" clause have at least sufficient weight to be a legitimate motive for a legislative determination that the risk should not be run. See *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Follett* v. *Town of McCormick,* 321 U. S. 573 (1944); *First Unitarian Church* v.

County of Los Angeles, 357 U. S. 545 (1958); *Mayor and City Council of Baltimore* v. *A. S. Abell Co.*, 218 Md. 273, 145 A. 2d 111 (1958); Compare *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936). Fear of constitutional restrictions is a proper consideration in a legislative exemption. See *Carmichael* at 513.

Apart from these considerations, there is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices, and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. Real estate developers are donating sites to churches in their planned communities as part of the efforts to attract purchasers.[4] Columbia, a city projected to arise in Howard County between Baltimore and Washington, plans to have churches as well as supermarkets and office buildings as part of the community—obviously in the hope of attracting purchasers for the lots and houses. Anderson, *A Brand New City for Maryland*, Harper's Magazine, November, 1964. The Baltimore Urban Renewal and Housing Agency, whose goal is the prevention and elimination of blight and slums, has invited churches, with other community groups

4. "The Danherst Corporation, which is building Fairless Hills (5,100 homes scheduled) * * * has donated four church sites based on surveys and studies and cleared through the Department of Research and Planning of the Philadelphia Council of Churches.

Levitt & Sons have donated 10 excellent sites to churches in Levittown (17,000 homes scheduled), in Bucks County, Pennsylvania. Levitt & Sons, themselves, chose the church sites and selected their donees.

Recently, Edmund N. Bacon, Executive Director of the Philadelphia City Planning Commission, incorporated 13 church sites in plans for the vast C-1 Housing Project for Northeast Philadelphia (15,000 homes proposed)." Halko, American City, March 1955, p. 7. See also, Leiffer, The Effective City Church, 126 (rev. ed. 1955).

and institutions, to share in the formulation of plans for project areas.[5] The increase in the general tax base through the building of houses and apartment houses by persons attracted by the presence of a church in the neighborhood is a governmental motive in no way connected with the support or establishment of religion.[6] The object sought can not reasonably be deemed to be attainable with equal effect without the tax exemption of houses of worship.

We have found no case, federal or state, which holds that a tax exemption such as is here involved, confined to houses of worship, parsonages and the grounds appurtenant thereto and necessary therefor, violates the First Amendment or any other provision of the federal Constitution. Several cases, decided after *Everson*, have held to the contrary. *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, 654, 298 P. 2d 1, *appeal dismissed* for want of a substantial Federal question, *sub. nom. Heisey* v. *County of Alameda*, 352 U. S. 921 (1956), held that a provision of the

5. See Baltimore Urban Renewal Commissioners statement of Jan. 8, 1960, "Policy of the Baltimore Urban Renewal and Housing Agency in its Relationship with Churches", reprinted in City Church, Sept./Oct. 1960, p. 13.

6. Church zoning cases which deal with the effect of permits for the building of houses of worship on immediately adjacent property are not here in point. For collections of and comments upon such zoning cases, see Curry, Public Regulation of the Religious Use of Land, 310-330 (1964) and cases therein cited. Note, Churches and Zoning, 70 Harv. L. Rev. 1428 (1957). Note, Church-State Religious Institutions and Values: A Legal Survey, 1958-59, 35 Notre Dame Law, 402, 405-11 (1960). The effect of the building of a church upon the values of adjacent property may be quite different from the stimulation to house buying and building in the community as a whole.

In Maryland, zoning laws generally permit the building of houses of worship in a residential zone without application for variance or special exception. Levy v. Seven Slade, Inc., 234 Md. 145, 154, 198 A. 2d 267 (1964—Baltimore County); Kaslow v. Rockville, 236 Md. 159, 165, 202 A. 2d 638 (1964—Rockville, Montgomery County). The Baltimore City Zoning Code does not exclude houses of worship and parsonages from the permitted uses in a residential area.

Appendix I

California Revenue and Taxation Code granting a tax exemption to property used exclusively for school purposes of less than collegiate grade and owned by religious, hospital or charitable organizations, did not violate the "establishment" clause of the First Amendment. The court said:

> "* * * [I]t is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."

The opinion also referred to the history of tax exemptions to religious institutions. In *General Finance Corp.* v. *Archetto*, —— R. I. ——, 176 A. 2d 73 (1961), *appeal dismissed* for want of a substantial Federal question, 369 U. S. 423 (1961), a taxpayer contended that he was assessed at a higher rate because of a tax exemption for buildings used for religious purposes and that the exemption violated the First Amendment; the court held the exemption constitutional. See also *Sisters of Holy Cross* v. *Town of Brookline*, 347 Mass. 486, 497-8, 198 N. E. 2d 624 (1964) and *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).

We do not reach the question of whether, absent the tax exemption here involved, the taxation of church owned properties would violate the "free exercise" clause of the First Amendment. For the reasons set forth, we hold that the exemption does not violate the "establishment" clause, and is constitutional.

DECREE AFFIRMED; COSTS TO BE PAID BY APPELLANTS

APPENDIX II

Opinion of Circuit Court No. 2 of Baltimore City

(January 7, 1965)

MEMORANDUM OPINION

The Original Bill of Complaint was filed in this Court on October 15, 1963 by Madalyn E. Murray, Trustee and Leddie Mays, the Original Plaintiffs, against the Comptroller of the Treasury of Maryland, the Director of the State Department of Assessments and Taxation, the Supervisor of Assessments of Baltimore City and the Director of Assessments of Baltimore City. The prayers for relief were that:

1. Article 81, Section 9(4) of the Annotated Code of Maryland (1957 Edition), (the "Maryland Code"), be declared unconstitutional.

2. The Original Defendants be enjoined from carrying out Article 81, Section 9(4) of the Maryland Code and from granting any further exceptions from taxation under that Section.

3. The Original Defendants be directed to include upon their lists to taxable property all houses and buildings used for public worship and any parsonage used in connection therewith and the grounds appurtenant to such houses, buildings and parsonages, and also be directed to levy and collect taxes upon such houses, parsonages and grounds appurtenant which are not used for religious services or for public worship, and

4. The Original Plaintiffs may have other and further relief.

Appendix II

The Court permitted five religious bodies to intervene as parties Defendant. These were the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church in The Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America.

The Court also permitted Lemoin Cree and Marie Cree, his wife, and Freethought Society of America to intervene as additional parties Plaintiff. This intervention will receive additional comment later in this Opinion.

The Original Bill of Complaint is a taxpayers suit filed by Mrs. Murray, as trustee and by Mrs. Mays, as taxpayers, on their own behalf and on behalf of all other taxpayers similarly situated. They allege that they are citizens of the United States and of the State of Maryland and are taxpayers of the State of Maryland (the "State") and of the City of Baltimore (the "City") by virtue of their ownership of a joint leasehold estate in the property 1526 Winford Road, Baltimore City, Maryland.

It is then alleged that the Original Defendants have various duties in regard to the assessment and collection of taxable property in the State and City; that taxes are levied by the Original Defendants against the property of the Original Plaintiffs and are levied uniformly against all other like property owners whose property is not exempted from taxation; that owners of property, like in kind and in situation to the property of the Original Plaintiffs are not being taxed uniformly with them by the Original Defendants but are being exempted from assessment and taxation where such properties are being used for public worship, i.e., public religious services, or are being used as parsonages in connection with such places of public worship and appurtenant grounds, such exception being purportedly granted by Article 81, Sec. 9(4)

of the Maryland Code; and, that these actions by the Original Defendants place a direct detriment and financial burden upon the Original Plaintiffs "whose tax burden is thereby increased for the sole purpose of aiding and supporting the religious practices and religious institutions of others, since a decrease in the taxable basis, does by law require an increase in the rate of taxation of those taxed."

Five grounds of unconstitutionality and invalidity under both the Constitutions of the State and of the United States are then alleged. These are:

1. The acts of the Original Defendants contravene Article 35 of the Declaration of Rights in the Maryland Constitution as they in direct effect compel the Original Plaintiffs as taxpayers, and all other taxpayers, to maintain and contribute to a place of worship or a ministry.

2. These acts and practices violate Article 15 of the Maryland Declaration of Rights providing for uniformity of tax assessments so that taxes may be imposed upon all members of the community for public purposes only and the furtherance of public worship is not a valid public purpose.

3. These acts, practices and statute *deny* due process of law contrary to Article 23 of the Maryland Declaration of Rights.

4. These acts, practices and statutes violate the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment of That Constitution in that they constitute a law respecting an establishment of religion and a law prohibiting the free exercise thereof.

5. These acts, practices and statutes deny due process of law under the Fourteenth Amendment.

It is further alleged that declaratory relief is required under the Uniform Declaratory Judgments Act (Article 31 A, Sections 1-16 of the Maryland Code), that injunctive relief is also required and that the Original Plaintiffs have no adequate remedy at law.

As the constitutionality of a statute of the State is involved, the Attorney General of Maryland was served with a copy of the Original Bill of Complaint as required by Article 31 A, Section 11 of the Maryland Code.

Answers were duly filed on behalf of the Original Defendants and on behalf of most of the Intervening Defendants. In general these Answers indicated no knowledge in regard to the status or property holdings of the Original Plaintiffs and denied the various legal conclusions set forth in the Original Bill of Complaint; in most of the Answers it was denied that the Original Plaintiffs had sufficent interest, financial or otherwise, to seek a declaratory decree under the Uniform Declaratory Judgments Act, that there was a justiciable issue sufficent to give the Original Plaintiffs standing to obtain an injunction on the grounds that Article 81, Section 9(4) of the Maryland Code was unconstitutional, that there was a case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States and that the exception under the Maryland Statute was unconstitutional.

In the original answers filed on behalf of the Original Defendants, it was admitted that the Original Plaintiffs were taxpayers of the State of Maryland. This admission was withdrawn in an Amended Answer filed on June 25, 1964 with leave of Court.

In the answer filed on behalf of Temple Emanuel of Baltimore, the interesting and novel defense is raised that not only is the exemption of the synagogue from tax-

ation by Article 81, Sec. 9(4) of the Maryland Code constitutional, but that a failure to except that place of public worship from taxation by the State and City would result in "an unlawful and unconstitutional abridgment of religious liberty, the free exercise of religion and the separation of church and state" in violation of the First and Fourteenth Amendments to the Constitution of the United States and the Maryland Declaration of Rights.

The suit came on for hearing on its merits on July 1, 1964. Leonard J. Kerpelman, solicitor for the Original Plaintiffs asked leave of Court, in open Court at the hearing, to move for the intervention of Lemoin Cree and Marie Cree, his wife, and of Freethought Society of America, ("Freethought Society"), an Ohio Corporation, as additional parties Plaintiff, and for leave to file an Amended Bill of Complaint setting up their position as taxpayers and their interest in the litigation.

Mrs. Murray and Mrs. Mays had removed themselves from the State of Maryland to the State of Hawaii shortly prior to the hearing under circumstances which need not be recited here. The solicitors for the Original Defendants and for some of the Intervening Defendants strenuously objected to the requested intervention of Mr. and Mrs. Cree and of the Freethought Society and the filing of an Amended Bill of Complaint on their behalf. The Court reserved its ruling on the motion at that time and directed the hearing to proceed, subject to the exception of the Original Defendants to the motion for intervention.

Subsequent to the completion of the testimony on July 1, 1964, Mr. Kerpelman, in accordance with the Court's suggestion at the hearing, filed a formal Petition for leave to file an *Interlineated Amended Bill of Complaint* and submitted the proposed Amended Bill of Complaint. These papers were filed in the Clerk's Office on July 23,

1964. The only substantial change in the Original Bill of Complaint was the addition of Mr. and Mrs. Cree and the Freethought Society as parties Plaintiff and of a new Paragraph 2-A setting out the properties of these new Plaintiffs.

The testimony established the following:

Mr. and Mrs. Cree reside near Middletown, Frederick County, Maryland. They own 2 acres, more or less, in fee simple, on the top of South Mountain in Frederick County, near Middletown. Freethought Society is an Ohio Corporation which owns the fee simple estate in the property 2502 North Calvert Street, Baltimore, Maryland. The Crees and the Freethought Society are both taxpayers of the State of Maryland. Mr. and Mrs. Cree are also taxpayers of Frederick County; the Freethought Society is also a taxpayer of Baltimore City.

Mr. Cree, who is 26 years of age, is a Research Analyst in Micro-biology at Fort Detrich, an installation of the Federal Government in Frederick County. He graduated from High School in Colorado and received his B.S. degree in Botany at the University of Colorado. He and his wife, as owners of their South Mountain property, paid taxes to the State of Maryland (and to Frederick County) in the years 1961, 1962 and 1963. He is an atheist, which he defined as a person who denies that there is a demonstrable supernatural being. He believes that atheism frees men's minds, is scientific and is not a religion as usually defined. He believes in a moral code but in none connected with any religious system. He believes that right and wrong are determined by the civil law.

Within two weeks prior to the hearing, Mr. Cree was elected President and Treasurer of both the Freethought Society and of Other Americans, Inc. Mrs. Murray was removed as President and Treasurer and was made Chairman of the Board of those Corporations. The Freethought

Society publishes the "American Atheist", a monthly magazine. Any excess money from the Freethought Society is transferred to Other Americans, Inc., the legal arm of the atheist movement.

The Freethought Society owns the property 2502 North Calvert Street, Baltimore, Maryland, where meetings of the Board of Directors are held. Meetings of the members are held twice a year. The Board has authorized the intervention of itself and of Mr. and Mrs. Cree as parties Plaintiff. The Corporation has not applied for a tax exemption under Article 81, Section 9(4) of the Maryland Code. As a non-profit corporation it is exempt from Federal income taxes.

Timely motions were made to strike out all of Mr. Cree's testimony. The Court reserved its ruling on these motions.

The Original Defendants offered the testimony of John G. Arthur one of the Original Defendants and Director of the Department of Assessments of Baltimore City for the past 12 years. Prior to being Director, he was Deputy Director for 11 years. He has been with the City's Department of Assessments for 38 years in all. He is a devoted and well informed public servant. After describing his duties as Director, which include the assessment of property in the City for tax purposes and the application of the laws of the State in regard to such assessment, Mr. Arthur pointed out that the taxable basis in substantial part is determined by the assessments made by his Department, the budget is formulated by the Budget Director, approved by the Board of Estimates and is then submitted to the City Council of Baltimore City for final action. By the provisions of the Baltimore City Charter, the City Council may eliminate or reduce items in the budget, but may not increase them. After the final amount of the City's Budget is determined, the tax rate on real property forming the principal part of

the taxable basis is fixed. The greater the amount of the assessable basis is, the less each taxpayer has to pay on his own real estate. As property which is exempt from taxation by law is not part of the assessable basis.

At the request of the Attorney General, Mr. Arthur had assembled the computer sheets of the City which showed the tax exempt property in the City as exempted by Article 81, Section 9(4) of the Maryland Code, as places of public worship, parsonages, and appurtenant ground. There are a number of other exemptions from taxation in Section 9, including public property, fraternal beneficiary associations, hospitals, charitable institutions, etc., as will be later pointed out, but the computer sheets offered as Agreed Exhibit 1, were confined to Subsection 4 of Section 9. Christian congregations were divided into two groups: "Roman Catholic", marked with a red check mark, and "Protestant" marked with a blue check mark. Jewish congregations were marked with a green check mark. While not purporting to be an absolute check, the study is roughly accurate and shows the following total assessments exempt in the levy for 1964 from taxation in the City under Article 81, Section 9(4):

Protestant	$41,031,430
Roman Catholic	31,339,880
Jewish	6,136,510
	$78,507,820

The records of the City indicate the total assessable basis of the City for 1964 as follows:

All taxable real property	$2,263,708,768.00
All tax exempt property	578,997,400.00
Total of all real estate, both taxable and exempt	$2,842,706,168.00

Appendix II

Of the $578,997,400 total exempt property, $78,507,820.00 is exempt by virtue of Article 81, Section 9(4) of the Maryland Code.

Mr. Arthur stated the methods used by the assessors of the Department in arriving at values for the purposes of taxation. There are the three usual methods used in real estate appraisal and spelled out in the Manual issued by the State Department of Assessments and Taxation, which, in time, is based on Boeck's Manual for Appraisers. In assessments for land, the comparable sales method is used, with a front foot calculation in many instances and in some, but not many instances, a unit value, based on an average valuation. For determining the value of buildings, the cost less depreciation method may be used. If this method is used, the land value is added to the value of the building as thus determined. In some instances a comparable sales value for the entire property may be used and in other instances an income capitalization method with appropriate allocations as between land and improvements, may be used.

Under the policy established by the State Department of Assessments and Taxation, the final figure for purposes of taxation of land assessed by the methods described is 60% of the current full cash value. Mr. Arthur freely admitted that assessment of property for taxation, even using the established methods outlined, "is not an exact science".

Article 81, Section 9(4) provides:

> "(4) *Churches, parsonages, etc.*,—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof."

Appendix II

In applying this exemption, Mr. Arthur and the City Department of Assessments have given the words "public worship" a comprehensive interpretation. Houses, buildings and appurtenant lands used for teaching or contemplating the beliefs of *any* philosophical system, regardless of whether that philosophical system includes a belief in a Supreme Being, are considered to be exempt under Section 9(4) and such exemptions are granted in the regular course of administering the tax laws. For example, the property used by the Baltimore Ethical Culture Society which does not teach any belief in a Supreme Being, but which confines its teachings to moral and ethical standards and educational purposes has been exempted under Section 9(4). Property used by Buddhist organizations for their religious teachings are exempted. The Philosophical College of Occult Science has had its property exempted under Section 9(4). Over objection and subject to exception, Mr. Arthur testified that after having heard Mr. Cree describe his philosophical system, if application were made, the property of the Freethought Society would be granted an exemption under Section 9(4).

The State tax rate is 15 cents for $100 of assessed value. This is levied to protect the bond issues of the State.

By stipulations in Agreed Exhibit 4, it was agreed that the Roman Catholic Archbishop of Baltimore is a corporation sole having title to, or being President of Corporations, having title to various properties of the Roman Catholic Church in the City including 163 parishes or mission churches. The history of the incorporation of the Convention of the Protestant Episcopal Church in the Diocese of Maryland was agreed upon in Agreed Exhibit 3, its authorization to intervene was established and a complete list of the properties of the Convention was given, with an aggregate value of Diocesan properties in excess

of $2,000,000. Temple Emanuel by stipulation in Agreed Exhibit 5, is a Reformed Jewish Congregation incorporated under Article 21 of the Maryland Code as a religious corporation, authorized to intervene in the suit. Its property in the City is assessed as follows:

Land	$16,945.00
Improvements	21,300.00
Total	$38,245.00

By agreed Exhibit 6, it was stipulated that the Congregations of the Maryland Synod of the Lutheran Church in America had total assets of $35,356,587 of which $13,637,275 were located in Baltimore City. This was subject to $247,625 of indebtedness. Its right to intervene was not challenged.

It was established also that the property 2502 North Calvert Street, Baltimore, Maryland was assessed for taxation for 1962 as follows:

Land	$1,640.00
Improvements	6,600.00
Total	$8,240.00

On this assessment, State and City taxes of $353.50 (less a discount on the City taxes of $3.41) were paid on January 24, 1964.

The individual assessments of the property occupied by the Cathedral of Mary Our Queen, the property occupied by the synagogue of the Baltimore Hebrew Congregation and the property occupied by the synagogue of the Har Sinai Congregation were given, but as these assessments all appeared to be in accordance with the meth-

ods used by the Department, it is not necessary in this suit to give the individual figures.

On July 24, 1964, Joseph Wase entered his appearance as solicitor for Mrs. Murray and Mrs. Mays. Also on that day, Mrs. Murray and Mrs. Mays, in answer to Interrogatories filed by the Attorney General on behalf of the Comptroller and the Director of the State Department of Assessments and Taxation, stated under oath, that they owned the property 1526 Winford Road, Baltimore, Maryland, 21212, which is subject to a mortgage of $10,000, on which they paid taxes of approximately $350.00 in 1963 and $370.00 in 1964 and that they had no intention of selling the property at the present time.

On July 27, 1964, Mr. Kerpelman filed a Petition reciting that he had been discharged as counsel for Mrs. Murray and Mrs. Mays and prayed leave to strike out his appearance for them. This permission was granted by the Court on the same day, and his appearance was stricken out on that day.

On August 10, 1964, the Court passed an Order granting leave to Mr. and Mrs. Cree and the Freethought Society to intervene as additional parties Plaintiff, allowing the filing of the Interlineated Amended Bill of Complaint as of the date of the Order and providing that the Answers of all the parties would be deemed to be refiled as Answers to the Interlineated Amended Bill of Complaint with leave to any party Defendant to file a Supplemental Answer to it, if filed on or before September 25, 1964. No Supplemental Answers have been filed.

The Court on August 17, 1964, upon the Petition of Mr. Wase, solicitor for Mrs. Murray and Mrs. Mays, passed an Order permitting Hyman M. Greenstein, an attorney in Honolulu to enter his appearance for the purposes of this case as counsel associated with Mr. Wase.

His appearance was duly entered for them on the same day.

Mr. Wase, on August 10, 1964, on behalf of Mrs. Murray and Mrs. Mays, filed Interrogatories addressed to the Convention, Archbishop Shehan and Temple Emanuel asking for various data in regard to their property holdings, its income, what property taxes have been paid on any of their property, and what their collections were from offerings as well as income derived from suppers, and various other fund raising affairs.

Seasonable motions to strike these Interrogatories were made by the three Intervening Defendants mentioned, on the grounds that the filing of the Interrogatories was not timely in that testimony had been concluded and the Court had determined the question of intervention so that there was nothing remaining to be the subject of inquiry and further that one of the briefs had already been filed. The Court is of the opinion that the Motions to Strike these Interrogatories should be granted for the reasons stated in the Motion and also because the information sought to be elicited would not be necessary for the disposition of the case in view of the testimohy taken at the trial on the merits.

In view of the change in counsel by Mrs. Murray and Mrs. Mays, the Court granted leave to Mr. Wase to withdraw the papers in the case for photostating and on August 17, 1964 extended the time of Mr. Wase and Mr. Greenstein until September 30, 1964 within which to file a Memorandum on behalf of Mrs. Murray and Mrs. Mays, with an extension to the Defendants to file their Memoranda until October 31, 1964.

Mr. Kerpelman filed his Memorandum promptly after the hearing and well within the time originally fixed for filing the Memorandum on behalf of the Plaintiffs. Mr.

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Wase and Mr. Greenstein filed their Memorandum on behalf of Mrs. Murray and Mrs. Mays on September 28, 1964. The other Memoranda have now been filed. All of the Memoranda are well prepared, and, like the arguments of counsel at the hearing, have been most helpful to the Court.

It may be added that on August 21, 1964, Mrs. Murray, one of the Original Plaintiffs, filed a Motion supported by her Affidavit and Exhibits, for an Order disqualifying Mr. Kerpelman as attorney for Freethought Society and for Lemoin Cree, from further participation in the suit. The Motion charges Mr. Kerpelman with having violated Canon 27 of the American Bar Association's Canons of Professional Ethics in regard to loyalty to a client and keeping the client's confidence, stating in effect that Mr. Kerpelman and Mr. Cree conspired to oust Mrs. Murray from her position as President of Freethought Society and Other Americans, Inc. and that Mr. Kerpelman failed to act in accordance with her instructions.

Mr. Kerpelman on September 3, 1964 filed a Motion Ne Recipiatur to the Motion as the Motion was not appropriate to any issue in the suit and was not relevant. On September 15, 1964, Mr. and Mrs. Cree and Freethought Society filed an Answer to the Motion denying the allegations in Paragraphs 1, 2, 3 and 4 of the Motion to Disqualify.

Mr. Wase filed a Petition on October 13, 1964 to strike out his appearance for Mr. Murray, trustee and Mrs. Mays reciting that he had not received his fee and Judge Jones on that day granted him leave to strike out his appearance, leaving only Mr. Greenstein as attorney for the Original Plaintiffs in the case.

No hearing on the Motion Ne Recipiatur to the Motion to Disqualify having been requested, the Court will proceed to dispose of that Motion. The Motion Ne Recipiatur,

in the Court's opinion, should be granted. The proof at the hearing established that Mr. Kerpelman did represent Mr. and Mrs. Cree and also the Freethought Society. His appearance is entered for them and the relief for which they prayed was granted by the Court prior to the filing of the Motion to Disqualify. Mrs. Murray's relief, if any, should be directed at Mr. Kerpelman if he has been guilty of the things alleged by her in her Motion. Then too, there has been no conflict between the position urged by the Original Plaintiffs and the Intervening Plaintiffs in this suit; these positions are identical. The case at bar is a class suit brought in behalf of *all* taxpayers of the City and State. Mr. and Mrs. Cree and Freethought Society as taxpayers after intervention, have a right to present their position to the Court, regardless of the alleged derelictions of their counsel. In this suit, Mr. Kerpelman vigorously and adequately presented the position of all of the Plaintiffs, both Original and Intervening, at both the argument and in his Memorandum.

Mr. Wase and Mr. Greenstein have also submitted their comprehensive Memorandum to the Court, after ample time to study the case at bar and prepare the Memorandum. There has been no prejudice resulting to Mrs. Murray, in this suit, whatever may be the difficulties between Mrs. Murray and Mr. Kerpelman.

The Court will admit into evidence the testimony taken subject to exception at the hearing.

Six legal questions are presented to the Court for decision. These are:

1. Do the Plaintiffs, both Original and Intervening, have sufficient standing as taxpayers to maintain the present suit?

Assuming that Question 1 be answered in the affirmative,

2. Does the exemption from taxation of "houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof" as provided in Article 81, Section 9(4) of the Maryland Code, violate Article 36 of the Declaration of Rights of the Maryland Constitution prohibiting the State from compelling any person to maintain or contribute to maintain any place of worship or ministry?

3. Does the exemption violate Article 15 of the Maryland Declaration of Rights requiring uniformity of taxation?

4. Does the exemption violate Article 23 of the Maryland Declaration of Rights prohibiting the State from depriving a citizen of life, liberty or property without due process of law?

5. Does the exemption violate the Fourteenth Amendment to the Constitution of the United States prohibiting a State from denying a citizen of the United States, life, liberty or property without due process of law?

6. Does the exemption violate the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment prohibiting Congress (and now the General Assembly of Maryland) from making any law "respecting an establishment of religion or prohibiting the free exercise thereof"?

The Court has concluded that Question 1 must be answered in the affirmative and holds that the Original and

Intervening Plaintiffs have sufficient standing as taxpayers to maintain the present suit. The Court, however, has concluded that all of the remaining questions,—Questions 2 through 6,—must be answered in the negative. The Court holds that the exemption violates no constitutional provision, State or Federal. The Bill of Complaint must be dismissed with prejudice, and the plaintiffs required to pay the costs of this suit.

The Court's reasons for these conclusions follow.

1. *The Plaintiffs, both Original and Intervening, have sufficient standing to maintain the present suit.*

The Defendants, both Original and Intervening, have earnestly argued that none of the Plaintiffs has sufficient standing to maintain this suit, but it seems clear to the Court that they have sufficient standing as taxpayers of the State and, except for the Intervening Plaintiffs, Mr. and Mrs. Cree, of the City of Baltimore as well. As indicated in the statement of the facts, the ownership of property has been established as well as the actual payment of taxes by all of the Plaintiffs. The suit is a *class suit,* on behalf of all taxpayers of the State of Maryland and of the City of Baltimore similarly situated to have declared void and enjoin the continuation of the exemption from taxation granted under Article 81, Section 9(4) of the Maryland Code.

Although the total assessed value of real estate in Baltimore City exempt from taxation ($578,997,400.00) is something over 20% of the total assessed value of all real estate in Baltimore ($2,842,706,168.00), the exemption under Section 9(4) ($78,507,820.00) is only approximately 2.8% of that total assessed value. It is approximately 13½% of the total assessed value of tax exempt real estate in Baltimore City. While the impact upon the taxes of the individual plaintiffs is probably not large,

the impact on *all* taxpayers is sufficiently substantial to maintain this suit as the testimony was clear that a reduction in the taxable basis raises the rate of taxation upon the property subject to taxation, and *increases* the taxes of those owning the property not exempt from taxation.

It is well settled in Maryland that where the statute and enforcement of it will *increase* the taxes of the complaining taxpayers, and this is alleged and proved, as in the case at bar, taxpayers have established special damage, or special interest, distinct from those of the general public enabling them to maintain a class suit challenging the validity of the statute and its enforcement. *McKaig* v. *Mayor and City Council of Cumberland,* 208 Md. 95, 116 A. 2d 384 (1955, Brune, C. J.); *Funk* v. *Mullan Contracting Co.,* 197 Md. 192, 78 A. 2d 632 (1951, Marbury, C. J.).

When, however, the statute and its enforcement *benefit* the taxpayers financially and *reduce* the amount of their taxes, they have no standing *as taxpayers* to challenge the financially beneficial statute. *Citizens Committee* v. *County Commissioners of Anne Arundel County,* 233 Md. 398, 197 A. 2d 108 (1964, Horney, J.). See the review of the Maryland Cases on pages 401-2 of 233 Md. (Page 110 of 197 A. 2d). As indicated, the allegations and proof establish a financial injury to the taxpayers, individually and as a class, which distinguishes the case at bar from the *Citizens Committee* Case.

It was also suggested at the argument and in one of the Memoranda that there was no standing in the plaintiffs, as taxpayers, to maintain a suit in the Federal Court in view of the decision of the Supreme Court of the United States in *Frothingham* v. *Mellon,* 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923, Sutherland, J.), holding, in effect, that Mrs. Frothingham's interest as *a* taxpayer, to restrain the enforcement of the "Maternity Act" of November 23,

1921, was so small and insignificant as to be within the Doctrine *de minimis non curat lex* and afforded her no standing to sue for the injunction.

See also *Elliott* v. *White, U. S. Treasurer,* 23 F. 2d 997 (1928 C. A. D. C., Robb, Associate Justice) following and applying the *Frothingham* decision to a suit by "*a* citizen" in a suit to enjoin the Treasurer of the United States from disbursing funds appropriated for the payment of the salaries of Chaplains in the Armed Forces as violating the First Amendment prohibiting the establishment of religion. But see *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913 (1930, Hughes, C. J.) involving a suit by taxpayers to enjoin the State Board of Education from purchasing and distributing free school books.

There are two answers to this suggestion:

1. This suit is in the State Court and not in the Federal Court. The Maryland law clearly gives relief to taxpayers in a class action in this type of situation.

2. Both the *Frothingham* and *Elliott* cases involved suits by a single taxpayer and were not brought as a class suit. It seems doubtful that they are authority for holding that a taxpayer class action may not be entertained in the federal courts, but as to this no opinion is expressed, as none is necessary; it involves a federal question best left to the decision of the federal courts.

The natural plaintiffs, both original and intervening, may also have a special interest, different from the public generally as active atheists, which might well give them sufficient status apart from their status as taxpayers, to maintain this suit in view of the decisions of the Supreme Court of the United States in *Abington School District* v. *Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844

(1963, Clark, J.) and *Engel* v. *Vitale*, 370 U. S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962, Black, J.).

As to this, however, the Court expresses no opinion as none is necessary since it too involves a federal question best left to the federal courts for decision.

2, 3 and 4. *The exemption does not violate Articles 36, 15 or 23 of the Declaration of Rights of the Maryland Constitution.*

The alleged violation of Articles 36, 15 and 23 of the Declaration of Rights of Maryland Constitution may be considered together as the Court of Appeals of Maryland has already indicated that the exemption does not violate these provisions of the Declaration of Rights in *Baltimore City* v. *Starr Church*, 106 Md. 281, 67 A. 261, (1907, Rogers, J.). Before considering the *Starr Church* Case, it will be helpful to consider the particular exemption under attack.

As already indicated, the exemption in question is Subsection 4 of Article 9 of Article 81 of the Maryland Code. Section 9 is headed "Exemptions". There are then many subsections granting exemptions from State, County and City taxation of which Subsection 4 is one. At the time of the filing of the Bill of Complaint in this suit there were 57 specific exemptions including the property of fraternal beneficial associations, graveyards, war memorials, hospitals, charitable institutions, educational and literary institutions, veteran's organizations, works of art, certain historical societies, Boy Scouts, Girl Scouts, volunteer fire companies, Ruritan International, state, county, city and federally exempt property and many other exemptions.

As already indicated the exception under Subsection 4 is a small part of the total assessed value of real estate in Baltimore City exempt from taxation under Section 9.

An exemption from taxation similar to that granted by Section 9(4) has existed in Maryland since the State began

the general taxation of real estate by the Act of 1797, Chapter 89, passed on January 20, 1798. The exemption in that Act was: "except property belonging to the State or the United States, houses for public worship, burying grounds * * *". This basic exemption has continued in each tax statute adopted in Maryland since the original Act of 1797, Chapter 89 until the present time.

Article 38 of the Declaration of Rights of the Maryland Constitution for many years *required* the sanction of the General Assembly for any gift, sale or devise of land or gifts or sales of personal property to take place after the death of the Seller or Donor for the support or benefit of any Religious Sect, Order or Denomination "except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, for a church, meeting-house, or other house of worship, or parsonage, or for a burying ground, which shall be improved, engaged or used only for such purpose."

A constitutional amendment to Article 38 was adopted by the voters at the election of November 2, 1948 which gave the General Assembly *power to require* such sanction but did not *itself require* such sanction without such a statute, to gifts and conveyances subject to November 2, 1948.

It is thus seen that houses of worship, parsonages and appurtenant ground have been exempt from taxation and from legislative sanction and approval in Maryland for over 165 years. The exemption has been uniformly applied and administered and has not been the object of any substantial attack heretofore.

In the case of *Baltimore City* v. *Starr Church,* 106 Md. 281, 67 A. 261 (1907, Rogers, J.), supra, the Court of Appeals of Maryland, in considering and declaring unconstitutional, under Articles 15 and 33 of the Declaration of Rights, a special act purporting to grant a specific exemp-

tion for a particular property owned by a church of one denomination, strongly indicated that the general exemption of houses of worship, parsonages and appurtenant land was entirely constitutional. Judge Rogers, speaking for the Court of Appeals, stated at page 286 of 106 Md.:

> "It will not be denied at this late day that the Legislature has the power, within reasonable limits, to exempt certain species or classes of property from taxation, when the public interests so require. This is actually done in the case of houses used exclusively for public worship, and the grounds appurtenant thereto, in the case of graveyards and cemeteries, and in the case of hospitals, asylums and benevolent institutions. (Code, 1904, Art. 81, sec. 4). The validity of provisions of this kind is too well established to be now questioned. But it will be perceived in these classes *all* the property of the *class* indicated is exempted. The Legislature does not exempt *some* houses of public worship and tax others. It does not exempt *some* graveyards and cemeteries, *some* hospitals, and then tax other properties of exactly the same kind. It does not arbitrarily say that *this* particular house of public worship shall be exempt, but *that* one shall be taxed. On the contrary, all property falling within any one of the classes mentioned in Sec. 4, is exempt. There is therefore no arbitrary discrimination between different properties of the same kind, but all are treated alike."

There is no Maryland case indicating any different opinion and this statement from the *Starr* case represents the Maryland law on this subject.

It may be pointed out that the real property of churches not used for houses of worship and parsonages, but held

for use or even for the *future* construction of churches or parsonages is subject to real estate taxation to the same extent as similar property held by private persons.

There is nothing unusual about the Maryland exemption. Indeed there is a similar exemption in all of the other States of the Union, and in the District of Columbia. In 33 States, constitutional provisions *expressly provide for the exemption* and in 15 of those States *the constitutional language is mandatory.* In the other States and the District of Columbia, there are statutory exemptions, as in Maryland. It is interesting to note that in the last two States to be recently admitted to the Union—Alaska and Hawaii—there are similar exemptions. See Van Alstyne, "Tax Exemption of Church Property," 20 Ohio St. L. J. 46 (1959).

The opinion of the Court of Appeals in the *Starr Church* case indicating the validity of the exemption involved in this suit, is in accord with the decisions of every Court in the United States which has considered the question. See *LeFevre* v. *Mayor, etc. of Detroit,* 2 Mich. 586, 592 (1853, Green, J.); *Trinity Church* v. *City of Boston,* 118 Mass. 164, 165 (1875, Colt, J.); *Trustees of Griswold College* v. *State,* 46 Iowa 275, 282 (1877, Rothrock, J.); *Trustees of the First Methodist Episcopal Church, South* v. *The City of Atlanta,* 76 Ga. 181, 192, 196-197 (1886, Hall, J.); *Snyder* v. *Town of Newton, Connecticut,* 147 Conn. 374, 161 A. 2d 770, 776 (1960, Baldwin, C. J.), appeal dismissed 365 U. S. 299 (1961, P. C.); *General Finance Corp.* v. *Archetto,* 176 A. 2d 73, 76-79 (R. I. 1961, Powers, J.), appeal dismissed, 369 U. S. 423 (1961, P. C.); *State ex rel. Reynolds* v. *Nusbaum,* 17 Wis. 2d 148, 115 N. W. 2d 761, 766 (1962, Currie, J.).

Other Courts have indicated the beneficial results of such exemption, without specifically considering the constitutional issues possibly involved. See *Nichols* v. *School*

Directors, 93 Ill. 61, 64 (1879, Sheldon, J.); *Y. M. C. A. of Omaha* v. *Douglas County,* 60 Neb. 642, 83 N. W. 924, 926 (1900, Holcomb, J.); *Commonwealth* v. *Y. M. C. A.,* 116 Ky. 711, 76 S. W. 522, 523 (1903, O'Rear, J.); *Church of the Holy Faith* v. *State Tax Commission,* 39 N. M. 403, 48 P. 2d 777, 784 (1935, Bickley, J.).

With such universal and long continued constitutional and legislative practice in all of the States and the District of Columbia and with such unanimity of judicial authority, this Court must hold that the exemption does not violate Articles 36, 15 or 23 of the Declaration of Rights of the Maryland Constitution.

5. The exemption does not violate the Fourteenth Amendment to the Constitution of the United States prohibiting a State from denying citizens of the United States, life, liberty, or property without due process of law.

It is well settled that the State may select its objects of taxation and may decline altogether to tax certain kinds of property, as long as there is a reasonable basis for the exemption.

Carmichael v. *Southern Coal and Coke Co.,* 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1936, Stone, J.).

Williams v. *Baltimore,* 289 U. S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933, Cardozo, J.).

In order to sustain exemptions from taxation granted by the legislative branch of the State government to encourage or foster the public good, all that is necessary is a showing of some fairly discernible relationship between the good of the person receiving the exemption and the good of the community.

Mr. Justice Cardozo in *Williams* v. *Baltimore, supra,* a case arising in Maryland and specifically considering a tax exemption granted by the General Assembly of Maryland,

to a particular Railroad Company by the Acts of 1931, Chapter 497, alleged to violate Article 15 of the Maryland Declaration of Rights, states at pages 40 and 41 of 289 U. S.:

> "The Courts of Maryland hold that the rule of uniformity established by these provisions does not forbid the creation of reasonable exemptions in furtherance of the public good. Baltimore v. B. & O. R. Co. 6 Gill, 288, 48 Am. Dec. 531; State v. Baltimore & O. R. Co. 48 Md. 59; State v. Baltimore & O. R. Co. 127 Md. 434, 96 Atl. 636; State v. Northern C. R. Co. 44 Md. 131; State v. Philadelphia, W. & B. R. Co. 45 Md. 361, 24 Am. Rep. 511; Daly v. Morgan, 69 Md. 460, 467, 16 Atl. 287, 1 L. R. A. 757; Baltimore, C. & A. R. Co. v. Ocean City, 89 Md. 89, 42 Atl. 922; Baltimore, C. & A. R. Co. v. Wicomico County, 93 Md. 113, 48 Atl. 853; Havre de Grace v. Havre de Grace & P. Bridge Co. 145 Md. 491, 125 Atl. 104; Tax Cases, 12 Gill & J. 117, cf. Gordon v. Appeal Tax Ct. 3 How. 133, 11 L. ed. 529; Picard v. East Tennessee V. & G. R. Co. 130 U. S. 637, 641, 32 L. ed. 1051, 1052, 9 S. Ct. 640. It does not even prohibit an exemption in favor of an individual as distinguished from one for the benefit of the members of a class. All that it exacts in respect of the narrower exemption is the presence of a relation, fairly discernible, between the good of the individual and the good of the community."

As already pointed out, the exemption of houses of worship, parsonages and appurtenant land is only one of 57 exemptions which the General Assembly has determined should be made for the public good. These include hospitals, charitable institutions, fraternal orders, veterans

organizations, historical societies, the Boy Scouts, the Girl Scouts and many others. These exemptions produce socially desirable results and most certainly have a fairly desirable relationship between the exemption and the good of the community.

The Supreme Court of the United States has sustained a similar exemption in the District of Columbia. *Gibbons* v. *District of Columbia,* 116 U. S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886, Gray, J.).

In regard to the power of Congress to provide for such an exemption, Mr. Justice Gray speaking for the Court stated:

> "* * * the power of Congress, legislating as a local Legislature for the District, to levy taxes for district purposes only, in like manner as the Legislature of a State may tax the people of a State for state purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318 (18 U. S. bk. 5 L. ed. 98); Welsh v. Cook, and Mattingly v. District of Columbia, 97 U. S. 541, 687 (Bk. 24, L. ed. 1112, 1098). In the exercise of this power, Congress like any State Legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

See also *United States* v. *Department of Revenue of Illinois,* 202 F. Supp. 757 (1962, N. D. Ill. three Judge Court, LaBuy, D.J.) sustaining, as non discriminatory and constitutional, a retailer's occupation tax exemption accorded to persons selling to non-governmental institutions operated for charitable, religious, or educational purposes.

The three-Judge Court, stated (at page 759):

> "The exemption accorded to non-governmental institutions operated for charitable, religious and edu-

cational purposes is not of recent origin, but is the continuance of an old and well-established public policy. Article IX, Sec. 3 of the Constitution of the State of Illinois S. H. A., provides that property used exclusively for charitable, religious and educational purposes may be exempted from taxation by general law. The Revenue Act of the State of Illinois, Secs. 500.1, 500.2, 500.7, ch. 120, expressly exempts from taxation property used for such beneficent objectives. Many states of the Union have similarly provided for such exemptions from taxation. The federal government has also exempted the income of corporations organized and operated exclusively for religious, charitable or educational purposes. 26 U. S. C. A. Sec. 501(c).

"The exemption of these institutions encourages their existence and relieves the State of the heavy burden of maintaining and performing these essential services. Article VIII, Sec. 3 of the Constitution of the State of Illinois forbids the use of public funds in the 'aid of any church or sectarian purposes' nor may 'any grant or donation of land, money or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose.' Obviously, a distinct dissimilarity exists between religious institutions and governmental bodies. While charitable and educational objectives can, and are, performed through governmental units, the revenue to support them is derived from the power and authority of the government to tax its citizens for the public welfare. But no compulsory process exists to exact contributions to non-governmental organizations dedicated to the moral, spiritual and physical well-being of mankind. The financial resources to accomplish their objectives are derived

from the concept of giving voluntarily—without legal obligation or compulsion. This difference forms a reasonable basis for a separate classification and the exemption, therefore, does not discriminate against governmental bodies."

This decision was affirmed by the Supreme Court of the United States, without opinion, in *United States* v. *Department of Revenue of Illinois*, 371 U. S. 21, 83 S. Ct. 117, 9 L. Ed. 2d 95 (1962).

This Court must conclude that there is no denial of due process of law as prohibited to the States by the Fourteenth Amendment to the Constitution of the United States.

6. *The exemption does not violate the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, prohibiting Congress (and now the General Assembly of Maryland) from making any law "respecting an establishment of religion or prohibiting the free exercise thereof."*

Question 6 was the one principally argued in this case. It is an interesting and provocative question.

At the threshold of the consideration of this question, one is met with the curious idea that the Fourteenth Amendment imposed the restrictions upon the powers of Congress contained in the first Amendment upon the legislatures of the several States. Without discussion of prior decisions of the Supreme Court of the United States to the contrary—or indeed, without the discussion of *any* cases, the legislative history of the Fourteenth Amendment, or any other relevant factors—the Supreme Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940, Roberts, J.) simply held that "the fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amend-

ment." This holding has been followed since *Cantwell* by the Supreme Court, it being last applied in *Abington School District* v. *Schempp,* supra. The cases are reviewed in the majority opinion of Mr. Justice Clark (217 of 374 U. S.). He suggests that to question this holding is "entirely untenable and of value only as academic exercises". This Court is of the opinion that the holding is "entirely untenable" and is still firmly of this opinion notwithstanding the brilliant consideration of this holding by Mr. Justice Brennan in his concurring opinion in *Abington* (253 to 258 of 374 U. S.).

This presently prevailing doctrine, however, has been assumed to have been the applicable Constitutional Law by the Court of Appeals of Maryland in *Murray* v. *Curlett,* 228 Md. 698, 179 A. 2d 698 (1962, Horney, J., Brune, C. J., Henderson and Prescott, J. J., dissenting) in both the majority and dissenting opinions. This Court will make this same assumption for the purpose of this case. It merely files a *caveat* now, with a view to setting out its views in regard to this doctrine at a later time and in a different forum.

The questions then are presented as to whether the exemption results in "an establishment of religion" or in state action "preventing the free exercise thereof", as the first clause of the First Amendment states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The arguments of the parties present three widely different positions:

The Plaintiffs, both Original and Intervening, take the position that the exemption does result in an establishment of religion and in state action prohibiting the free exercise thereof.

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The Original Defendants, and all of the Intervening Defendants, except Temple Emanuel, assert, that although the State of Maryland *has the power* to impose real estate taxation upon houses of worship, parsonages and appurtenant land, it also has the power to exempt them and that the exemption in the case at bar is a reasonable, proper and non-discriminatory exemption which does not result in an establishment of religion or prohibit the free exercise thereof.

Temple Emanuel urges upon the Court that, as properly interpreted in the light of several recent decisions of the Supreme Court and their logical application to the present problem, the State of Maryland has no power to impose real estate taxes upon houses of worship, parsonages and appurtenant land as this would result in prohibiting the free exercise of religion contrary to the provision of the First Amendment. This is a fascinating thought, but the Court does not find it necessary to pass this application of the First Amendment as it is not necessary for the decision in this case. The Court rejects the position advanced by the Plaintiffs and holds that the exemption is a reasonable, proper and non-discriminatory exemption which does not result in an establishment of religion or prohibit the free exercise thereof.

The First Amendment as presently construed by the Supreme Court establishes the principle of *government neutrality,* not only between different religious groups, but also as between believers and non-believers. An interesting recent book entitled "religion and American Constitutions" by Dr. Wilber G. Katz, Professor of law at the law School of the University of Wisconsin, (the book is made up principally of Professor Katz's 1963 Rosenthal Lectures of Northwestern University School of Law) in his last Chapter entitled "Epilogue. Neutrality as of June 1963", states at page 91:

Appendix II

"Through the foregoing lectures runs the theme that the impact of the First Amendment on religion is best understood in terms not of church-state separation but of government neutrality—neutrality not merely between sects, but also between believers and nonbelievers. This broad neutrality is promoted by judicial action checking legislative aberrations in either direction. But in many fields where laws affect religion incidentally, the promotion of neutrality requires affirmative provision for religion. Here legislatures have been left with discretion; in this area provisions affirmatively fostering religious freedom are not invalid as "establishing" religion, but their omission does not make the legislation invalid as a restraint on "free exercise" of religion."

The exemption involved in the case at bar represents governmental neutrality, not prohibited by the First Amendment. The Supreme Court indicated the validity of such an exemption in the District of Columbia in *Gibbons* v. *District of Columbia*, supra, in 1886. Such validity is indicated by Mr. Justice Brennan in his concurring opinion in *Abington* on June 17, 1963. He states (301 and 302 of 374 U. S.):

"Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax

exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God."

All other authorities, both State and Federal, have sustained the holding that this type of exemption is constitutional and valid.

See the following State cases:

City and County of San Francisco v. *McGovern*, 28 Cal. App. 491, 152 P. 980, 989 (1915, Chipman, P.J.); *Garrett Biblical Institute* v. *Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1, 4-5 (1928, Farmer, J.); *State* v. *Alabama Educational Foundation, Ala.*, 163 So. 527, 530 (1935); *Lundberg* v. *County of Alameda*, 46 C. 2d 644, 298 P. 2d 1 (1956, Gibson, C.J.) dismissed, sub nom. *Heisey* v. *Alameda*, 352 U. S. 921 (1956, P.C.); *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 673, 315 P. 2d 394, 406-409 (1957, Peters, P.J.); *General Finance Corp.* v. *Archetto*, 176 A. 2d 73, 76-79 (1961, Powers, J.), dismissed 369 U. S. 423 (1961, P.C.); *Sisters of Holy Cross* v. *Town of Brookline*, 1964 Mass. Adv. Sh. 807, 198 N.E. 2d 624 (1964, Spiegel, J.).

See the following cases from the lower Federal Courts:

County of Santa Clara v. *Southern Pacific R. Co.*, 18 F. 385, 400 (C.C.D. Cal., per Associate Justice Field, 1883), affirmed, 118 U. S. 394, 6 S. Ct. 1132, 30 L. Ed. 118, (1886, Harlan, J.); *Sovereign Camp, W.O.W.* v. *Casados*, 21 F. Supp. 989 (D.C. N.M., 1938, Murrah, D.J.), affirmed 59 S. Ct. 84, 83 L. Ed. 352, 305 U. S. 558 (1938 P.C.); *United States* v. *Department of Revenue of State of Illinois*, 202 F. Supp. 757 (D.C. N.D., Ill., 1962, LaBuy, D.J.),

affirmed 371 U. S. 21, 83 S. Ct. 117, 9 L. Ed. 2d 95, (1962 *per curiam*); *Swallow* v. *United States,* 325 F. 2d 97 (10th Cir., 1963 *per curiam*), cert. denied 371 U. S. 950 (1963), rehearing denied, 372 U. S. 925 (1963).

In *Swallow* v. *United States,* supra, there was a direct challenge to the federal income tax exemption to religious institutions. This failed in the United States Court of Appeals for the Tenth Circuit on December 12, 1963. The Supreme Court denied *certiorari* and also a rehearing.

This Court concludes that the exemption does not result in the establishment of religion or in state action prohibiting the free exercise thereof.

As indicated, this holding is as far as this Court need go, and it is as far as it does go.

It may be added, however, that if the Supreme Court of the United States decides to consider any *new* application of the provisions of the First Amendment in regard to the exemption in the case at bar, there is much in the prior decisions of the Supreme Court which gives aid and comfort to the position of Temple Emanuel. It would appear that the Supreme Court would likely move in this direction.

In *Murdock* v *Pennsylvania,* 319 U. S. 105, 63 S. Ct. 891, 87 L. Ed. 1292 (1943), Douglas, J. speaking for the majority consisting of himself and Stone, C.J., Roberts, Black, Murphy and Rutledge, J.J. (Reed, Frankfurter and Jackson, J.J. dissenting), indicated that the City of Jeannette, Pennsylvania, had no power to impose upon a Jehovah's Witness promulgating his religious teachings and selling (or giving away) religious books and pamphlets published by the Watch Tower Bible & Tract Society, a rather small general license tax upon persons canvassing for or soliciting for goods, paintings, pictures, wares or merchandise of any kind. In discussing the activity of the "itinerant preacher", distributing tracts

from door to door, Mr. Justice Douglas indicated at page 109 of 319 U. S.:

> "It has the same claim to protection as the more orthodox and conventional exercises of religion."

It would seem to follow from this, that the more conventional exercise of religion in a house of worship where the sermons are preached and the sacraments or other rites performed is also entitled to the exemption from taxation given the itinerant preacher.

In his dissenting opinion, Mr. Justice Reed, points this out as he states (133 of 319 U. S.):

> "This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of an indefinite extension."

Mr. Justice Goldberg in his concurring opinion in *Abington* (306 of 374 U. S.) suggests that there should be no hostility to the religious as this is prohibited by the provisions of the First Amendment.

For the State to exempt the property of other charitable corporations used for charitable purposes and decline to exempt the property of houses of worship, parsonages and appurtenant land would indeed be an act of "hostility toward the religious" and would represent "a brooding and pervasive devotion to the secular", which Mr. Justice Greenberg indicates is prohibited by the First Amendment. This would destroy the principle of "neutrality" and would, in effect, cause government to intervene on the side of the secular and non-believer.

It may also be pointed out that but for the exemption, it would be almost impossible, as a practical matter, to

avoid discrimination between the assessments of the houses of worship, parsonages and appurtenant land as these assessments are made by individuals having various religious beliefs (or no religious belief) in an area in which individual judgment plays a substantial part, as pointed out by Mr. Arthur in his testimony. Complete exemption of houses of worship, parsonages and appurtenant land from real estate taxation by the State is far more calculated to maintain the required neutrality than any possible system of taxation could be. The States and the United States do well not to enter this "religious thicket." They may well have the premonition that the provisions of the First Amendment prohibit such an entry as Temple Emanuel urges. As indicated, however, it is not necessary to make this holding.

The Court passed and filed a final decree in this suit, which effectuated the holdings in this Opinion, on December 14, 1964. The Decree indicated that this Opinion would thereafter be filed. The Clerk is directed to file this Opinion in the suit.

/s/ WILSON K. BARNES,
Judge.

January 7, 1965.

APPENDIX III

Code of Maryland, Article 81, Section 9

§9. Exemptions.

The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:

(1) *Public property.*—Property, real and personal, tangible and intangible, belonging to this State or to any county or city of this State.

(2) *Real and personal property of incorporated fire insurance salvage corps and fire companies.*—Real and personal property owned by any incorporated fire insurance salvage corps without capital stock which uses its property as aid to the fire department of any county or city in this State, and the real and personal property owned by any incorporated fire company.

(3) *Fraternal beneficiary associations.*—The property of any fraternal beneficiary association incorporated or licensed under Article 48A of the Code of Public General Laws of this State, except real estate, chattels real and office equipment, and shares of stock in domestic corporations and national banks the taxes upon which are required by this article to be paid by such corporation for account of the shareholders.

(4) *Churches, parsonages, etc.*—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof.

(5) *Graveyards, etc.*—Graveyards, cemeteries, mausoleums and other burial places for the dead, (including bury-

ing grounds and/or mausoleums set apart for the use of any family or belonging to any church or congregation) and cemetery and/or mausoleum companies which are not operated for pecuniary profit and which do not accumulate profits for any purpose other than the maintenance or improvement of their cemeteries, graveyards or mausoleums as cemeteries or graveyards and/or mausoleums. To obtain the exemption from taxation allowed by this subsection the owner or owners of a graveyard or cemetery, or of a mausoleum or mausoleums which do not accumulate profits for any purpose except for the maintenance or improvement of such cemetery, graveyard or mausoleum shall apply to the county commissioners of the county in which such cemetery, graveyard or mausoleum may be located by a written petition, signed and sworn to by such owner or owners, in which petition shall be stated a brief history of the land or lands or structure or structures composing such cemetery, graveyard or mausoleum, the condition of the titles thereto, from whom obtained, at what price bought, and upon what terms, and the particulars of the ownership of such land or lands or structure or structures, and its or their value or values for five years prior to its or their conversion into a cemetery, graveyard or mausoleum; and no such exemption from taxation shall be allowed by said county commissioners unless they be satisfied that the land or lands or structure or structures included in such cemetery, graveyard or mausoleum has been acquired for the purposes of a cemetery, graveyard or other burial place, at its or their fair value, and that the formation of such cemetery, graveyard or mausoleum was a bona fide public purpose and neither directly nor indirectly involved a profit to the organizers thereof. Whenever any cemetery company or other owner of a mausoleum or mausoleums shall have sold crypts in such mausoleum or mausoleums to purchasers who have purchased the same for the purpose of

burial of the dead, the said mausoleum or mausoleums shall be exempt from taxation to the extent to which the value of the crypts sold bears to the total value of the mausoleum or mausoleums. When all crypts in any mausoleum or mausoleums have been sold such mausoleum or mausoleums shall be totally exempt from taxation.

(6) *War memorials.*—Real property in the State of Maryland owned by nonprofit organizations and maintained as a commemorative park or as a site for a monument in memory of those who fought in the armed forces of the United States of America or the Confederate States of America; provided that no more than fifteen acres shall be exempted for any one association.

(7) *Hospitals, charitable institutions, etc.*—(a) Buildings and the ground not exceeding one hundred acres in area appurtenant thereto, and necessary for the respective uses thereof, equipment and furniture of hospitals, asylums, charitable, fraternal or benevolent institutions or organizations incorporated or unincorporated, no part of the net income, except sick or death benefits, of which inures to the benefit of any private shareholder or individual, provided such fraternal organizations are carried on solely for the mutual benefit of their members and their beneficiaries and not for profit and have a lodge system, with ritualistic form of work, and representative form of government. The above exemptions shall also apply to any such property held by any corporation or trustees for the benefit of any of the aforegoing institutions or organizations. Any property of such institutions or organizations which is commercially rented shall be taxable to the extent of such commercial use on fair value of the property so rented.

(b) All nonpolitical women's clubs, incorporated under the laws of the State of Maryland, for which no stock is issued, and no part of the net income of which inures to

private shareholders or individuals, and whose charter shows that the only purposes of such club are of a charitable, benevolent, educational and civic nature to promote the public welfare, and that any benefits or enjoyment or entertainment received from membership in said clubs are incidental to such purposes, shall be deemed to be a charitable, benevolent and educational institution for the purposes of this section.

(c) This subsection shall not apply to college or high school fraternities or sororities or other fraternal organizations membership in which is restricted wholly or largely to students or graduates of educational institutions or professional schools.

(d) Real estate or any estate therein, heretofore or hereafter acquired and held for future use, and not for investment, by any hospital or asylum not organized or conducted for profit, provided that the exemption of property held for future use granted by this subsection shall be for the period January 1, 1947, to December 31, 1966.

(e) All exemptions from taxation hereunder shall be allowed by the assessing authority upon the filing of a claim in writing under oath, made by or on behalf of the institution or organization claiming the same, showing the right to the exemption, briefly describing the property for which exemption is claimed. Such exemptions shall be allowed and prorated by the assessing authority for the remainder of any taxable year from the date the claimant shall have acquired possession of the real property intended to be exempt thereunder.

(f) The governing body of any subdivision of the State by appropriate resolution, may return any taxes collected on property which would have been exempt had proper

claim in writing been made therefor in the manner provided hereunder.

(8) *Educational and literary institutions.*—Buildings, furniture, equipment and libraries of educational or literary institutions, no part of the net income of which inures to the benefit of any private shareholder or individual, and the ground not exceeding (outside of any city) one hundred acres in area, appurtenant thereto, and necessary for the respective uses thereof.

(9) *Crops in hands of producer.*—Crops or produce of any land in the hands of the producer or his agent.

(10) *Provisions and food for family use.*—Provisions and food kept for the use and consumption of the family of the person to whom such provisions and food shall belong.

(11) *Farming Implements—Generally; Baltimore and Howard counties.*—Fifteen hundred dollars in value of the farming implements of any farmer. Notwithstanding the provisions of this subsection, in Howard County, farm implements shall be exempt from assessment and taxation for county purposes. Notwithstanding the provisions of this subsection, in Baltimore County, farm implements shall be exempt from assessment and taxation for county purposes.

(11½) *Same—Carroll County.*—Notwithstanding the provisions of subsection (11) of this section, in Carroll County, for purposes of county taxation only, and over a ten-year period beginning July 1, 1965, as of the beginning of the ten-year period, farm implements as now taxed shall be exempted in increasing amounts in equal ratios for each of the ten years, until at the end of the ten-year period, and thereafter, such implements are entirely exempt. At any time before the end of the ten-year period, the County Commissioners, by resolution, may provide for an entire ex-

emption of farm implements; or may provide for an entire exemption in a lesser period of time than ten years, in which case farm implements shall be exempted in increasing amounts in equal ratios for each year of the lesser period, until at the end of the lesser period they are entirely exempt.

(11A) *Same—Harford County.*—For the purposes of county taxation in Harford County, the farming implements of any bona fide farmer shall be exempt to the extent of 60% of the value thereof for assessments made as of January 1, 1966; 80% of the value thereof for assessments made as of January 1, 1967; and from and after January 1, 1968, such farm implements shall be entirely exempt from valuation, assessment, and taxation under the provision of this section.

(12) *Wearing apparel.*—Wearing apparel of any description, except diamonds and other costly jewelry not habitually worn on the person.

(13) *Fish.*—Fish while in the possession of fishermen employed in catching, salting and packing the same, or while in the possession of their agents unsold.

(14) *Tangible property of corporations and banks when shares of such corporations are taxable.*—Tangible, personal property of any domestic corporation having a capital stock divided into shares or any national bank located in this State, if the shares of stock of such corporation are subject to taxation under the laws of this State, or of any foreign finance corporation doing business in this State, if the capital stock of such corporation is subject to taxation under the laws of this State.

(15) *Stock in transportation companies paying gross receipts tax.*—Shares of stock in railroad, express or transportation, parlor car and sleeping car companies which are

subject to taxation under §130 upon their operating revenues within this State; and (from State taxes only) the operating property of such companies when the revenues therefrom within this State are subject to taxation under §130.

(16) *Stock in building and homestead associations.*—Shares of stock in domestic building and homestead associations to the extent that such shares represent investments in cash, fixtures, loans or hypothecated stock of such association, judgments or decrees of courts of this State, mortgages on real estate, situated in this State, ground rents issuing from property located in this State, stock of the Home Loan Bank of Winston-Salem, debentures of the Federal Housing Administration, and bonds of the Home Owners Loan Corporation, of the United States, of the State of Maryland, and of any county, city or municipal corporation or other political subdivision of the State of Maryland, and, bonds, debentures and other obligations of the Maryland Savings-Share Insurance Corporation, and such other investments as may be made in accordance with the provisions of §150, and §§160Z and 161Z of Article 23 (1961 Supplement), as amended from time to time, depending upon which section is effective.

(16½) *Bonds, stock and other direct obligations of Baltimore City and of counties adopting charters under Article XI-A of the Constitution.*—The principal of and interest on any bonds, stock or other direct obligations of the City of Baltimore, or of any county of this State which has adopted or adopts a charter under Article XI-A of the Constitution of this State, this exemption to apply to any such bonds, stock or other direct obligations, whether heretofore or hereafter issued, in the hands of the owner or owners thereof from time to time.

(17) *Household furniture and effects; special provision as to Wicomico County.*—Household furniture and effects

in this State held for the household use of the owners or members of his family, and not held or employed for purposes of profit or in connection with any business, profession or occupation; provided that any county or municipality, in the discretion of the county commissioners or the legislative body of any municipality, may levy, for county or municipal taxation only, upon such household furniture and effects in excess of one hundred dollars ($100) in value. All such household furniture and effects owned in Wicomico County shall be completely exempt from all county or State taxation.

(18) *Gunpowder Youth Camps, Inc.*—Property, real and personal, owned by Gunpowder Youth Camps, Inc., in Baltimore County, so long as it is used exclusively as a non-profit youth camp.

(19) *Personal property of savings banks, etc.*—Personal property, tangible or intangible, of any savings bank, savings institution or corporation organized for receiving deposits of money and paying or crediting interest thereon, and having no capital stock, except shares of stock in any national bank or in any corporation organized under the laws of the State and liable to taxation hereunder.

(20) *Preferred stock of electric railways.*—Shares of preferred stock issued after May 31, 1927, by any domestic electric railroad or street passenger railway coporation which derives not less than sixty-five (65) per centum of its gross receipts (directly or through one or more other corporations organized under the laws of this State) from passenger revenue and which preferred stock is preferred and limited as to dividends and assets; provided that the property acquired by such corporation with the proceeds of such preferred stock and all other property of such corporation shall be and continue subject to taxation in the same manner and to the same extent as, but to no greater extent than,

it would be if all of the stock of such corporation were subject to taxation and fully taxed; and the aggregate value of all shares of stock of such corporation as ascertained and determined by the State Department of Assessments and Taxation after the issue of such preferred stock shall not include or reflect the value of such preferred stock so issued or any part thereof, and such aggregate value as so ascertained and determined for subsequent years shall not exceed (a) the aggregate value of all taxable shares of stock of such corporation as ascertained and determined by the State Department of Assessments and Taxation for the year preceding the first year in which any part of such preferred stock shall have been issued, or (b) the assessed value of the real estate of such corporation plus all other amounts which are deductible from the aggregate value of its taxable shares, or (c) the market value of all taxable shares of stock of such corporation theretofore or thereafter issued, whichever is the greatest.

(21) *Property exempted by federal laws.*—Any property exempted from taxation by this State by the Constitution of the United States or by any act of Congress passed pursuant to and in conformity with the Constitution of the United States, only to the extent that such exemption is so required and no further.

(22) *Hand-worked tools of mechanics or artisans.*—Working tools of mechanics or artisans moved or worked exclusively by hand.

(23) *Tools, implements, etc., used in manufacturing or farming.*—Tools (including mechanical tools), implements, whether worked by hand, steam or other motive power, machinery, manufacturing apparatus or engines used in manufacturing, whether temporarily idle or not, in any county or city, as herein defined (including the City of Baltimore), whether exempted by the county in which said

city is located or not, in any political subdivision in which by law, resolution or ordinance the same are or may be exempt from county or city taxation; and the county commissioners of any county and any city, as herein defined, including the mayor and city council of Baltimore, are hereby authorized to pass such resolution or ordinance. Exemption by either a county or a city in said county shall not preclude the other taxing jurisdiction from imposing taxes on property so exempted by the one jurisdiction. If any county shall exempt the property hereunder, and a city in said county shall tax such property, the county shall furnish or make available to the taxing authorities of said city the assessment on the property so exempted by the county and taxed by the city. Such a tax exemption as is provided in this subsection shall be mandatory in Anne Arundel County and in the City of Frederick for county and municipal taxation, in the amount of at least twenty-five per centum (25%) of the total assessed valuation, and in the amount of forty per centum (40%) of the total assessed valuation, in Frederick County and each year beginning in the tax year 1964 the exemption in Frederick County shall increase ten per centum (10%) until an exemption of one hundred per centum (100%) is reached, and such a tax exemption as is provided in this subsection shall be mandatory in Washington County in the amount of at least twenty-five per centum (25%) of the total assessed valuation; and such a tax exemption shall be mandatory in Kent County as to all manufacturers employing in excess of thirty (30) persons, in the amount of seventy-five per cent (75%) of the total assessed valuation, said exemption to be effective for the period ending December 31, 1970, only. Notwithstanding the provisions of this subsection, tools (including mechanical tools), implements, whether worked by hand, steam, or other motive power, machinery, manufacturing or farming apparatus, or engines, used in manufacturing or farming,

whether temporarily idle or not, are exempt from State taxation.

(24) *Raw materials and manufactured products of manufacturers.*—Raw materials on hand and manufactured products in the hands of the manufacturer in any city and/or county in which by law, resolution or ordinance the same are or may be exempt from county and/or city taxation; provided that nothing in this subsection shall exempt any such property from State taxation or from assessment therefor. Such a tax exemption as is provided in this subsection shall be mandatory in Anne Arundel County, and in the City of Frederick for county and municipal taxation, in the amount of at least twenty-five per centum (25%) of the total assessed valuation, and in the amount of forty per centum (40%) of the total assessed valuation in Frederick County and each year beginning in the tax year 1964 the exemption in Frederick County shall increase ten per centum (10%) until an exemption of one hundred per centum (100%) is reached; such a tax exemption as is provided in this subsection shall be mandatory in Washington County in the amount of at least twenty-five per centum (25%) of the total assessed valuation; and such a tax exemption shall be mandatory in Kent County as to all manufacturers employing in excess of thirty (30) persons, in the amount of seventy-five per cent (75%) of the total assessed valuation, said exemption to be effective for the period ending December 31, 1970, only. This subsection does not apply in or to Carroll County.

(25) *Property of veterans' organizations.*—Property, real or personal, owned by the Veterans of Foreign Wars of the United States, incorporated by special act of Congress, the American Legion, incorporated by act of Congress, American Veterans of World War II, incorporated by act of Congress in 1947, the Military Order of the Pur-

ple Heart, Department of Maryland, Incorporated, the Catholic War Veterans of the United States, the Fleet Reserve Associations, the Jewish War Veterans of the United States of America, or the Disabled American Veterans of the World War, incorporated in 1921, under the laws of Ohio, the 29th Division Association of World War I, or any department, State or local unit, chapter, branch or post, whether incorporated or unincorporated, of any of said organizations, or the Society of the Cincinnati of Maryland; provided such property is used exclusively for houses, clubs, asylums, hospitals and burial grounds, or the maintenance thereof, of any of said organizations.

(26) *Vessels and aircraft engaged in interstate commerce.*—All ships or other vessels, including aircraft, which are regularly engaged in commerce, in whole or in part, outside the territorial limits of this State.

(27) *Works of art.*—Paintings, bronzes, marbles and other works of art owned by individuals, and not purchased or held for monetary profit, or in connection with any business, and which are offered to the public authorities for exhibition for at least 30 days in each year.

(28) *Certain institutions exempt from street assessments in Baltimore City.*—All buildings, equipment and furniture of hospitals, asylums, churches, places of worship, charitable and benevolent institutions, or the grounds appurtenant thereto, in any county, city or incorporated town of this State, shall be exempted from the payment of any assessment for the opening, grading, macadamizing and paving of any road or street in said county, city or incorporated town; and any such assessment now levied against any such property, and not collected, is hereby cancelled. Provided that this section shall only apply to Baltimore City.

Appendix III

(29) *Rolling stock of persons other than transportation companies.*—From county and city taxation only, rolling stock of persons other than railroad, express or transportation, parlor car and sleeping car companies.

(30) *Credit unions.*—Shares of stock in credit unions.

(31) *Certain historical and other societies; Chester County Council Boy Scouts; Friends of the Library of Cecil County; Naval Academy Alumni Association.*—Property, real and personal, owned by the Historical Society of Frederick County, Inc., the Montgomery County Historical Society, Inc., the Historical Society of Talbot County, Maryland, Inc., the Dorchester County Historical Society, Inc., the Historical Society of Kent County, Maryland, Inc., the Howard County Historical Society, Inc., the Worcester County Historical Society, the Queen Anne's County Historical Society, the Wicomico Historical Society, Inc., the Historical Society of Carroll County, Maryland, Inc., and Historic Annapolis, Inc., and any other nonprofit society or agency in Anne Arundel County which is devoted to the study of history or the maintenance and preservation of historic homes and places; and any property in Cecil County owned by the Society for the Preservation of Maryland Antiquities, Inc., Chester County Council Boy Scouts of America, and Friends of the Library of Cecil County, Maryland, Inc. Such of the grounds, buildings and personal property of a certain property commonly known as Ogle Hall, situate at the corner of College Avenue and King George Street, Annapolis, Anne Arundel County, as are owned by the United States Naval Academy Alumni Association, Inc., shall likewise be exempted under this section. The old Lloyd Street Synogogue property at the northeast corner of Lloyd and Watson streets in the City of Baltimore, now owned by the Jewish Historical Society of Maryland, Inc., together with historical or re-

ligious personal property therein, is exempt under this section.

(32) *Motor vehicles, Classes A to J.*—Motor vehicles, Classes A to J, inclusive.

(33) *Boy Scouts' property.*—Property, real and personal, owned by the Baltimore Area Council, the Potomac Area Council, the Washington Area Council, and the National Capitol Area Council, Boy Scouts of America, Inc., and the Del-Mar-Va Council, Inc., Boy Scouts of America.

(34) *Bonds of University of Maryland Athletic Board, Inc.*—All bonds or certificates of indebtedness heretofore or hereafter issued by the University of Maryland Athletic Board, Inc., and the income therefrom shall be exempt from State, county and municipal taxation, provided that the proceeds derived from the sale thereof be used exclusively for the improvement of land and buildings owned by the State of Maryland and used in connection with the University of Maryland.

(35) *Dwelling houses of certain disabled veterans and blind persons.*—(a) Grant of Exceptions. The dwelling house and the lot or curtilage whereon the same is erected, of any citizen and resident of this State now, or hereafter honorably discharged or released under honorable circumstances from active service in any branch of the armed forces, who has been or shall be declared by the United States Veterans Administration or its successors to have a service-connected disability from total blindness, or from paraplegia or permanent paralysis of both legs and lower parts of the body resulting from traumatic injury to the spinal cord or brain, or from the amputation of both arms or both legs, or by reason of amputation, ankylosis, progressive muscular dystrophies or paralysis of both lower extremities, such as to preclude locomotion without the

aid of braces, crutches, canes or wheel chair, or who has qualified and received a grant for specially adapted housing under the requirements of the Veterans Administration. The dwelling house and the lot or curtilage whereon the same is erected of any blind person shall also be exempt from taxation, up to an assessed valuation of $6,000, in any instance; and for the purpose of this subsection a person shall be considered blind if he has permanent impairment of both eyes of the following status; central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than twenty degrees in the better eye. Such exemption shall be in addition to any other exemption of such person's real and personal property which now is or hereafter shall be prescribed or allowed by the Constitution or by law, but no taxpayer shall be allowed more than one exemption under this subsection.

(b) Filing Claim. All exemptions from taxation hereunder shall be allowed by the assessing authority upon the filing of a claim in writing under oath, made by or on behalf of the person claiming the same, showing the right to the exemption, briefly describing the property for which exemption is claimed and having annexed thereto a certificate of the claimant's honorable discharge or release under honorable circumstances, from active service, in time of war, in any branch of the armed forces and a certificate from the United States Veterans Administration or its successors, certifying to a service-connected disability of such claimant of the character above described. Such exemptions shall be allowed and prorated by the assessing authority for the remainder of any taxable year from the

date the claimant shall have acquired title to the real property intended to be exempt hereunder.

(c) Return of Taxes. The governing body of each municipality, by appropriate resolution, may return all taxes collected on property which would have been exempt had proper claim in writing been made therefor in the manner provided hereunder; provided, however, that such refunds shall not be made for any year or portion thereof prior to June 1, 1950.

(d) Meaning of "Dwelling House." "Dwelling house," as used herein shall mean any one-family or two-family building or structure owned and occupied by a claimant as his legal residence in this State, and includes any outhouses or appurtenances belonging thereto or usually enjoyed therewith.

(36) *Property of Montgomery County General Hospital.*—Real property owned by the Montgomery County General Hospital, Inc., as of June 1, 1951; and all tangible personal property owned by the said hospital and used directly in connection with the operation of the hospital.

(37) *Property of volunteer fire company or rescue squad.*—Property, real and personal, owned by any volunteer fire company, volunteer fire department or rescue squad in the State of Maryland.

(38) *Young poultry.*—All young poultry, including chickens, ducks, turkeys and guineas, not more than 6 months of age and not kept for reproductive purposes.

(39) *Certain small boats.*—Every boat, vessel and watercraft of any description which is one hundred (100) feet or less in over-all length.

(40) *Livestock—Baltimore, Howard and Wicomico counties.*—For purposes of county taxation in Wicomico

County only, livestock not being held for a longer period than six months, commonly known as "feeder" stock. For the purposes of county taxation in Howard County only, all livestock shall be exempt from assessment and taxation. For the purposes of county taxation in Baltimore County only, all livestock shall be exempt from assessment and taxation.

(40½) *Same—Carroll County.*—For purposes of county taxation only in Carroll County, and over a ten-year period beginning July 1, 1965, and as of the beginning of the ten-year period, livestock as now taxed shall be exempt in increasing amounts in equal ratios for each of the ten years, until at the end of the ten-year period, and thereafter, livestock is entirely exempt. At any time before the end of the ten-year period, the County Commissioners, by resolution, may provide for an entire exemption of livestock; or may provide for an entire exemption in a lesser period of time than ten years, in which case livestock shall be exempted in increasing amounts in equal ratios for each year of the lesser period, until at the end of the lesser period they are entirely exempt.

(40A) *Same—Harford County.*—For the purposes of county taxation in Harford County, livestock owned by any bona fide farmer in the county shall be exempt from valuation, assessments and taxation to the same extent as said farmer's farming implements.

(41) *Stock in finance companies making loans to farmers.*—Shares of stock in domestic finance corporations which make loans exclusively to farmers for agricultural purposes and the capital stock of foreign finance corporations which make loans exclusively to farmers for agricultural purposes.

Appendix III

(42) *Aircraft.*—Aircraft which are subject to the registration provisions contained in §22 of Article 1A of this Code.

(43) *Land, buildings and structures of Naval Academy Athletic Association.*—Land and the buildings and structures erected thereon in the City of Annapolis and in Anne Arundel County owned by the Naval Academy Athletic Association so long as the land, buildings and structures are used for athletic events and purposes.

(44) *Dams for electric power in Montgomery County.*—Every artificial barrier, commonly called a dam, which may be constructed across the Potomac River near the mouth of the Monocacy River in Montgomery County within the State by any electric power company.

(45) *Machinery, apparatus, etc., for operation of nuclear research or testing facilities.*—Tangible personal property in the form of machinery, tools and scientific apparatus, including nuclear reactors, particle accelerators and radiation sources and associated measuring, controlling, material-handling, pumping, cooling and containment equipment and special nuclear material which is part of or necessary for the efficient operation of a nuclear research or testing facility, in any county or city in which by law, resolution or ordinance, the same is or may be exempt from county and/or city taxation; and the county commissioners of any county and any city are hereby authorized to pass such resolution or ordinance. Except as otherwise provided in this article, this exemption shall not be construed to apply to any nuclear reactor for the commercial production of electric power.

(46) *Real property of manufacturer moving to St. Mary's County.*—The real property of any manufacturer employing more than seventy-five people who locates in

St. Mary's County after the effective date of this subsection shall be exempt from county and local assessment and taxation. But such exemption shall last only for a period of ten years.

(47) *Tobacco in State tobacco warehouse.*—Tobacco stored in the State tobacco warehouse.

(48) *Property of Habonim Camp Association Company.*—Property, real and personal, owned by the Habonim Camp Association Company, Incorporated, including all taxes assessed after January 1, 1958.

(49) *Girl Scouts' property.*—Property, real and personal, owned by Anne Arundel County Girl Scout Council, Baltimore Area Girl Scout Council, Frederick County Girl Scout Council, Girl Scout Council of Cumberland, Maryland, Girl Scout Council of Southern Maryland, Girl Scouts of the United States of America, Peninsula Girl Scout Council, Washington County Girl Scout Council, Wilmington-Area Girl Scout Council and the units or troops of Girl Scouts in the State of Maryland.

(50) *Radiation fallout shelters.*—(a) For purposes of this subsection a radiation fallout shelter is (i) a structure outside of another building, or an addition to, or alteration of, an existing building, or a portion of a newly constructed building which is of a type of construction more dense than the general type of construction of the remainder of said newly constructed building, (ii) erected upon lands occupied for residential purposes by not more than two families and (iii) constructed in accordance with specifications published by the office of civil and defense mobilization of the United States government for one of the shelter types or designs approved by said agency as being effective for affording protection from radiation fallout.

(b) Any structure outside of another building, or any underground, or partially underground, addition to an existing building, or any underground, or partially underground portion of a newly constructed building, which constitutes a radiation fallout shelter, and which is used for no other purpose, shall be exempt to the full extent of the increase in assessable value, if any, of the taxpayer's property, attributable to such radiation fallout shelter.

(c) All other radiation fallout shelters, than those referred to in subsection (b) hereof, shall be exempt to the extent of the difference between the increase in assessable value, if any, attributable to such radiation fallout shelter as actually constructed, and the increase in assessable value, if any, had the addition, alteration or portion of a building constituting such other radiation fallout shelter, been constructed in a manner, and of materials, similar to that of the remainder of building, or had the structure outside any existing building, constituting such other radiation fallout shelter, been constructed in a manner and of materials similar to that of the principal residence building on the property.

(51) *Union-owned property in Allegany County.*—In all Allegany County for purposes of county taxation the property, real and personal, owned directly or indirectly by any bona fide labor union or unions, or by any corporation whose capital stock is exclusively owned by any bona fide labor union or unions, provided, that such property is used solely for the mutual benefit of its or their members and not for profit. Any part of such property which is commercially rented shall be taxable to the extent of the commercial use on the fair value of the property so rented.

(52) *Academy of the Arts, Easton, Maryland, Inc.*—Academy of the Arts, Easton, Maryland, Inc., as to prop-

erty used primarily for the purposes of the organization but not as to property used primarily for revenue or income-producing purposes.

(53) *Frederick Optimist Boys' Foundation, Inc.*— Property, real and personal, owned by the Frederick Optomist Boys' Foundation, Inc., providing property is not commercially rented. Operation of a parking lot, even at a fixed charge, shall not be construed to mean commercially rented. If part of property is commercially rented and so designated in a lease, the balance of the property is not eliminated from this tax exemption.

(54) *Nature Conservancy, Inc., in Calvert County.*— Real property owned by Nature Conservancy, Inc., in Calvert County.

(55) *Stock in corporation licensed under Small Business Investment Act of 1958.*—All shares of stock in any corporation licensed under the Small Business Investment Act of 1958, as amended (15 USCA 661 et seq. as amended), for the period January 1, 1959 through December 31, 1966. Any assessments made prior to June 1, 1961, upon the shares of stock of any such licensed corporation are hereby abated and any taxes paid prior to June 1, 1961, upon such assessments shall be refunded upon application by the taxpayer.

(56) *Property of local corporations affiliated with Ruritan International.*—Property, real and personal, owned by local corporations affiliated with Ruritan International, provided the property is utilized exclusively for the use or maintenance of the local corporations.

(57) *Real property in Anne Arundel County held by nonprofit community civic associations or corporations.*— For purposes of county taxation in Anne Arundel County

only, and in the discretion of the Board of County Commissioners, so directing, real property, title to which is held by nonprofit community civic associations or corporations, which property is dedicated by appropriate plat or deed restrictions to the use of the lot owners within the community, and which use is not contingent upon the payment of dues to such association or corporation or upon the payment of fees or other compensation in return for admission to or use of the property. As used in this subsection, "dues" and "fees or other compensation" shall not include assessments exacted and employed by such association solely for the improvement or maintenance of the roads, property, or other facilities of the community.

(58) *Airplane landing strips.*—For purposes of county taxation only, and in the discretion of the board of county commissioners, county council or mayor and city council of Baltimore, improved airplane landing strips, exclusive of the value of the land upon which they are located, which are owned by private persons, firms or corporations, and which are used by the general public and licensed pursuant to the provisions of Article 1A of this Code.

(59) *Green coffee beans.*—Green coffee beans imported from foreign countries while in the possession of and owned by the importer so long as no physical or chemical change has been made by any manufacturing process in such beans regardless of whether they are in their original packages.

(60) *Maryland Ornithological Society, Inc.*—For purposes of county and local taxation only, property real and personal, owned by the Maryland Ornithological Society, Inc., or any chapter thereof. (An. Code, 1951, §8; 1939, §7; 1929, ch. 226, §7; ch. 228; 1931, chs. 299, 354, 425; 1933, ch. 245; 1935, ch. 225; 1937, ch. 423; 1939, ch. 277, §17; ch. 387, §5; ch. 400; 1941, chs. 499, 770, 912; 1943, chs. 131,

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293, 488; 1945, chs. 4, 71, 600, 708, 776, 965 (15); 1947, chs. 99, 335, 536, 677; 1949, ch. 134, §7 (7); ch. 191, §7 (32); ch. 487, §7 (33); ch. 505, §7 (25); ch. 554, §7 (16); 1950, ch. 27, §7 (8); ch. 90, §7 (35); 1951, chs. 151, 241, 305, 447, 672; 1952, ch. 30; 1953, chs. 4, 755; 1954, chs. 30, 52; 1955, chs. 290, 348, 527; ch. 563, §1; chs. 658, 704; 1956, chs. 2, 81; 1957, chs. 30, 205, 230, 295, 513, 535, 728; 1958, ch. 96; 1958, 1st Sp. Sess., ch. 13; 1959, ch. 6; ch. 38, §1; chs. 170, 206, 217; ch. 261, §2; chs. 289, 402, 428, 476, 480, 562; ch. 639, §1; ch. 757, §1; ch. 787, §1; ch. 825; 1960, ch. 117; 1961, chs. 1, 135, 149, 175, 366; ch. 417, §1; chs. 449, 483, 627, 640, 831; 1962, ch. 11, §1; chs. 78, 103; ch. 131, §7; 1963, chs. 139, 446, 455, 475, 581, 609, 789; 1964, chs. 26, 28, 183; 1964, 1st Sp. Sess., ch. 19; 1965, chs. 130, 253, 312, 346, 347, 365, 382, 497, 590; ch. 702, §1; ch. 707.)

APPENDIX IV

Final Decree of Circuit Court No. 2 of Baltimore City

(December 14, 1964)

IN THE

CIRCUIT COURT NO. 2 OF BALTIMORE CITY

No. A-38851 Folio 343

Filed 12/14/64

MADALYN E. MURRAY, Trustee, and LEDDIE MAYS,
Original Plaintiffs,

LEMOIN CREE and MARIE CREE, his wife, and FREETHOUGHT SOCIETY OF AMERICA,
Intervening Plaintiffs,

vs.

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of Maryland, ALBERT W. WARD, Director, State Department of Assessments, ROBERT L. MAINEN, Supervisor of Assessments of Baltimore City, JOHN G. ARTHUR, Director of Assessments of Baltimore City,
Original Defendants,

and

THE MOST REVEREND LAURENCE J. SHEHAN, Roman Catholic Archbishop of Baltimore, a Corporation Sole, THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND, UNITED CHRISTIAN CITIZENS, INCORPORATED, TEMPLE EMANUEL OF BALTIMORE, and MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA,
Intervening Defendants.

Appendix IV

FINAL DECREE

The above entitled suit having come on for hearing upon the Original Bill of Complaint and the Interlineated Amended Bill of Complaint and the respective answers filed thereto, testimony having been taken, the argument of counsel for the parties having been heard, the Memoranda submitted by counsel having been read and considered and the Court, being of the opinion that motions heretofore filed to strike the Interrogatories filed by the Original Plaintiffs, addressed to The Convention of the Protestant Episcopal Church of the Diocese of Maryland, The Most Reverend Laurence J. Shehan, Roman Catholic Archbishop of Baltimore and to Temple Emanuel of Baltimore should be granted; that the motion Ne Recipiatur filed herein on September 3, 1964 to the motion of the Original Plaintiffs to disqualify and strike the appearance of Leonard J. Kerpelman should be granted; and that both the Original Plaintiffs and the Intervening Plaintiffs have sufficient status to maintain the above entitled suit but that on the merits of the suit the Original Bill of Complaint should be dismissed with prejudice and the Plaintiffs be required to pay the costs of this suit, or for the reasons and upon the facts to be set forth in a Memorandum Opinion of the Court, shortly to be filed herein, and the Court, being fully advised in the premises,

It is thereupon this 14th day of December, 1964 by the Circuit Court No. 2 of Baltimore City ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. That the motions heretofore filed in this suit to strike the Interrogatories filed by the Original Plaintiffs, addressed to The Convention of the Protestant Episcopal Church of the Diocese of Maryland, to The Most Reverend Laurence J. Shehan, Roman Catholic Archbishop of Balti-

more, and to Temple Emanuel of Baltimore, be and the same are granted and said Interrogatories be and they are hereby stricken and the same need not be answered;

2. That the motion Ne Recipiatur filed herein on September 3, 1964 to the motion of the Original Plaintiffs to disqualify and strike the appearance of Leonard J. Kerpelman be and the same is hereby granted;

3. That the Original Bill of Complaint filed herein on October 15, 1963 and the Interlineated Amended Bill of Complaint filed herein pursuant to the Order of this Court passed herein on October 10, 1964, be and the same hereby are dismissed with prejudice;

4. That the Original and Intervening Plaintiffs be and they hereby are required to pay the costs of this suit.

WILSON K. BARNES
Judge

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. ~~1309 and 1311~~ 132+133

LEMOIN CREE et al

Petitioners,

v.

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of Maryland, et al

Respondents,

MADALYN E. MURRAY, Trustee, et ano.

Petitioners,

v.

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of Maryland, et al

Respondents,

Memorandum Brief of Temple Emanuel of Baltimore, One of the Respondents, in Reply to Petition for Writ of Certiorari

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 1309 and 1311

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ARGUMENT

The parties in this case have taken these various positions with reference to the property tax exemption of houses of worship:

1. The petitioners contend that the exemptions are grants or subsidies constituting an establishment of religion in violation of the First Amendment of the U.S. Constitution.

2. All of the respondents, except this respondent, Temple Emanuel of Baltimore, support the exemption as a valid, discretionary, political decision of the state legislature. Because houses of worship serve worthy purposes, and their exemptions are so hoary in history and widespread in geography, they should be sustained *notwithstanding* the First Amendment.

3. This respondent, Temple Emanuel of Baltimore, defends the freedom of houses of worship from property taxation as a necessary recognition of affirmative rights of free exercise of religion. Viewed in this light, the exemptions are not a discretionary political or legislative act or an establishment of religion, because, even in the absence of an exemption, government would lack the constitutional power to levy ordinary property taxes on houses of worship. Therefore, the exemption is valid precisely *because of* the First Amendment.

Separation of church and state is bilateral and reciprocal, inhibiting both church and state from financial support of and involvement with each other. A "union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale,* 370 U.S. 421, 431. Therefore, "no tax . . . can be levied to support any religious activities or institutions." *Everson v. Board of Education,* 330 U.S. 1. Religious activity is not public; it is uniquely private. *Engel v. Vitale, supra; Abington School District v. Schempp,* 374 U.S. 203.

This respondent believes that the rationale of the Maryland Court of Appeals in the instant case is violative of

each of these principles of bilateral and reciprocal separation of church and state. The Opinion that the exemption puts houses of worship "in the same position as though they paid taxes . . . and then received back the amounts paid in the form of grants" [Murray, App. I, p. 15 a; Cree, p. 14 A] opens the door to nearly any kind of support of religious establishment that the state may decide to confer.

Nor can the reliance by the Maryland Court of Appeals on a secular test of religious activity [Murray, App. I, p. 17a—18a; Cree, p. 16A—17A] be justified in reliance on *McGowan v. Maryland,* 366 U.S. 420. The subject of the instant case is an exemption of—or, in the reasoning of the Maryland Court of Appeals, a *grant* to—a house of worship. Worship must surely be the area which is most nearly religious. Of the whole gamut of religious activity, worship must surely be the least secular of all. Viewed as a discretionary subsidy, grant or political donation of public funds, exemptions to houses of worship cannot be justified as a *secular* activity of government, without losing meaningful separation and religious freedom in the process.

Such a loss is, in the view of this respondent, too great a price to pay for exemption of the sanctuary. Nor need it be paid to sustain the exemption. This case involves exemption of houses of worship, as such. Such sanctuaries are so intimately connected with religious exercise that to levy a direct tax upon the value of such property to support over-all and general costs of government would constitute a tax on the exercise of religion, having the same effect as the tax on the itinerant evangelist, prohibited in *Murdock v. Pennsylvania,* 319 U.S. 105. On the prohibition of government from charging anything other than the

direct cost of religious activity to religious organizations in connection with religious exercise, in the nature of a permit or license fee, see *Cox vs. New Hampshire,* 312 U.S. 569. Subsequently, this Court has further advanced protection of free exercise in *Sherbert v. Verner,* 374 U.S. 398, 402-3; *Torcaso v. Watkins,* 367 U.S. 488; *Speiser v. Randall,* 357 U.S. 513; *Follett v. McCormick,* 321 U.S. 573; *Douglas v. City of Jeanette,* 130 F. 2d 652, affd. 319 U.S. 157. See also 49 Colum. L.R. 969, 989; 3 Rutgers L.R. 115, 123.

An ordinary commercial business, engaged in First Amendment activity, can be liable for all ordinary taxes and standards applied to other businesses. *Grosjean v. American Press Co.,* 297 U.S. 233; *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186. But there is a distinction between religious activity and ordinary commercial business. *Murdock v. Pennsylvania, supra,* at 115.

The area of valid governmental support of religion is limited indeed and has become increasingly narrower by decisions of this Court. This respondent, dedicated to church-state separation and free exercise, thinks that these increasing prohibitions upon government are proper and necessary. Therefore, this respondent is alarmed and concerned by the weakening of these principles, in the opinion of the Maryland Court of Appeals in this important case of first impression. This Court should speak to this vital issue by a decision that the very First Amendment which the petitioners have invoked to assail the exemption affords the only satisfactory basis for sustaining it. The exemption of the religious sanctuary is not any longer a legislative option; it has become a constitutional mandate.

CONCLUSION

For the reasons set forth hereinbefore, this respondent believes that the Writ of Certiorari should be *granted*, and the judgment of the Maryland Court of Appeals should be affirmed, but upon the grounds set forth herein.

Respectfully submitted,

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June 10, 1966

Office-Supreme Court, U.S.
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JUN 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NOS. ~~1309 and 1311~~ 132 & 133

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS GOLDSTEIN, WARD, MAINEN, ARTHUR and THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND IN OPPOSITION

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Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 1309 and 1311

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners,*

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents.*

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QUESTION PRESENTED

In addition to the questions set forth by the petitioners in their respective petitions, the following question is presented by this case:

Whether the constitutional issues that petitioners attempt to raise present a justiciable case or controversy under the provisions of Section 2 of Article III of the constitution of the United States.

STATEMENT OF THE CASE

The suit below challenging Maryland's statutory tax exemption for houses of public worship was originally brought by the petitioners Murray and Mays in Circuit Court No. 2 of Baltimore City against the respondents the Comptroller of the Treasury of Maryland, the State Director of Assessments and Taxation, the Supervisor of Assessments of Baltimore City and the Director of Assessments for Baltimore City. Subsequently, petitioners Cree and Freethought Society of America intervened in the case as plaintiffs, and the respondents the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church of the Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America intervened as defendants.

The complaint, which was brought in petitioners' capacity as taxpayers, alleged that the exemption [Section 9 (4) of Article 81 of the Maryland Code] is invalid because: (1) it violates Articles 15, 23 and 36 of the Declaration of Rights of the Maryland Constitution (2) it violates the First Amendment to the United States Constitution, made applicable to the states by virtue of the Fourteenth Amendment, because it is a law respecting the establishment of a religion and a law prohibiting the free exercise thereof (3) it violates the Fourteenth Amendment to the United States Constitution because it deprives the petitioners and others similarly situated of property without due process of law. All of the respondents except Temple Emanuel

answered the complaint by denying the petitioners' claims of unconstitutionality and challenging the petitioners' standing to bring the action. Respondent Temple Emanuel's answer also denied that the exemption was unconstitutional, but did so on the explicit ground, not asserted by the other respondents, that the Free Exercise Clause of the First Amendment prohibits governmental taxation of buildings used as houses of worship.

At the hearing in the circuit court, evidence was introduced by the parties to show the actual scope of the exemption, as it is applied by the taxing authorities, and the amount of property affected thereby. It was shown by the testimony of the Director of Assessments for Baltimore City that the exemption is comprehensively applied by the taxing authorities to all buildings used for the purpose of teaching or contemplating the beliefs of a philosophical system, regardless of whether that philosophical system includes as one of its precepts a belief in the existence of a Supreme Being. It was also shown, however, that the exemption is strictly applied only to buildings in actual use for such purposes, and, for that reason, is not available for property held by religious or philosophical organizations for investment or other such uses. Documentary evidence revealed that in Baltimore City the exemption excludes from real property taxation about 2.8% of the total assessable real estate in the City, and accounts for about 13.5% of all of the property exempted from taxation under the various exemptions provided by law.

At the conclusion of the case, the trial court, in a lengthy and well-considered opinion, dismissed the complaint with prejudice, finding that the petitioners had standing to assert all of their federal and state constitutional conten-

tions, but holding that the exemption is not unconstitutional as claimed. With respect to the federal constitutional questions, the court concluded that the exemption is not in violation of the Due Process Clause of the Fourteenth Amendment because there exists a fairly discernible relationship between the exemption and the public good, and that it does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment because it represents no more than a position of governmental neutrality toward religion, which the constitution does not forbid. In reaching its conclusion that the exemption is constitutional, the court found it unnecessary to consider respondent Temple Emanuel's argument that the Free Exercise Clause prohibits governmental taxation of houses of worship.

On appeal to the Court of Appeals of Maryland, the petitioners apparently abandoned their due process and free exercise contentions, for, in the case of petitioners Cree and Freethought Society of America, the only federal constitutional argument asserted was an establishment argument,* and in the case of petitioners Murray and Mays, the only federal constitutional contentions were an establishment argument and an equal protection argument, the latter being asserted by them for the first time.

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* Despite the fact that their brief in the Court of Appeals of Maryland contained no argument based on the Free Exercise Clause or the Due Process Clause, petitioners Cree and Freethought Society of America criticize the court for failing to have considered those provisions of the constitution in its opinion (petition, pp. 5-6, 13-14). This criticism is unjustified. Under the present rules of the Court of Appeals of Maryland, an argument not presented in a party's brief is considered to have been waived. See *Hyde v. State*, 228 Md. 209, 218, 179 A. 2d 421 (1962). Certainly in the light of this rule, the reasonableness of which is beyond question, petitioners Cree and Freethought Society of America must be regarded as having abandoned their free exercise and due process contentions in the Court of Appeals by not having presented them in their brief.

The Court of Appeals affirmed the trial court's decision dismissing the complaint, but on slightly different grounds than those relied upon by the trial court. The Court of Appeals held that the exemption does not violate the Establishment Clause because, despite its religious origins, the primary purpose and effect of the exemption is now secular in nature, and that it does not violate the Equal Protection Clause (a ground not presented to or considered by the trial court) because it is granted without discrimination to all organizations having or professing a belief concerning religion. Like the trial court, the Court of Appeals found it unnecessary in reaching its conclusion to consider respondent Temple Emanuel's free exercise contention.

Following the denial by the Court of Appeals of the motion of petitioners Cree and Freethought Society of America for a reargument, the petitioners filed in this Court their present petitions for a writ of certiorari.

ARGUMENT

It is respectfully submitted that this case presents no question that this Court should review on certiorari. The petitioners' constitutional attack upon Maryland's statutory tax exemption for houses of worship involves no federal question of any substance, and, in addition, presents no case or controversy reviewable by this Court under the provisions of Section 2 of Article III of the constitution of the United States.

A. *No Substantial Federal Question Is Presented*

Constitutional or statutory tax exemptions for houses of worship and other property of religious organizations exist in every state of the union and in the District of Columbia. Some of them date back to early colonial times while others, such as those of Alaska and Hawaii, are of very recent origin. See Note, *Constitutionality of Tax*

Benefits Accorded Religion, 49 Col. L. Rev. 968 (1949); Van Alstyne, *Tax Exemption of Church Property*, 20 Ohio St. L. J. 461 (1959); Kauper, *The Constitutionality of Tax Exemptions for Religious Activities* in "The Wall Between Church and State", 95, 110 (Oaks ed. 1963); Alaska Const., Art. IX, sec. 4; Rev. Laws of Hawaii 1955 (1961 Supp.) ch. 128-18. Throughout the long history of these exemptions in this country, not one has ever been set aside as invalid under the federal constitution, though the question has been raised from time to time in both the state and federal courts.

The state cases which have upheld such exemptions are: *City and County of San Francisco v. McGovern*, 152 P. 980, 989 (Cal. App., 1915); *Garrett Biblical Institute v. Elmhurst State Bank*, 163 N.E. 1, 4-5 (Ill., 1928); *State v. Alabama Educational Foundation*, 163 So. 527 (Ala., 1935); *Lundberg v. County of Alameda*, 298 P. 2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *Fellowship of Humanity v. County of Alameda*, 315 P. 2d 394, 406-409 (Cal. App., 1957); *General Finance Corp. v. Archetto*, 176 A. 2d 73, 76-79 (R.I., 1961), dismissed, 369 U.S. 423 (1962); *Sisters of Holy Cross v. Town of Brookline*, 198 N.E. 2d 624, 633 (Mass., 1964). The federal cases are: *County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385, 400 (9th Cir., per Associate Justice Field, 1882), affirmed, 118 U.S. 394 (1886); Sovereign *Camp, W. O. W. v. Casados*, 21 F. Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938); *United States v. Department of Revenue of State of Ill.*, 202 F. Supp. 757 (D.C. N.D., Ill., 1962), affirmed, 371 U.S. 21 (1962); *Swallow v. United States*, 325 F. 2d 97 (19th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

Although this Court has never in a full opinion addressed itself to the precise constitutional questions raised in the petitions, it has consistently indicated its accord with the view that no constitutional question of any importance is

presented in the exemption of property of religious organizations from taxation. For example, as recently as 1962 and 1956, it dismissed for want of a substantial federal question two appeals from state courts raising the identical questions presented here, *Lundberg v. County of Alameda,* 298 P. 2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956) and *General Finance Corp. v. Archetto,* 175 A. 2d 73 (R.I., 1961), dismissed, 369 U.S. 423 (1962); and in 1963 it denied certiorari in the only case directly challenging (but without avail) the federal income tax exemption to religious institutions, *Swallow v. United States,* 325 F. 2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963). Moreover, in *Abington School District v. Schempp,* 374 U.S. 203, 301 (1963), the recent case in which this Court declared unconstitutional the recitation of prayer and the reading of the Bible in the public schools, Mr. Justice Brennan's concurring opinion specifically recognized the validity of tax exemptions to religious groups.*

The foregoing are but reiterations of this Court's attitude throughout the years that tax exemptions for religious bodies are constitutionally inoffensive. On numerous occasions in the past the Court has had the opportunity to consider such exemptions in cases involving collateral questions, and it always has taken for granted their complete validity. See particularly *Gibbons v. District of*

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* As one of the reasons for upholding such exemptions, Mr. Justice Brennan pointed out that they have been given without discrimination to popular as well as unpopular sects, and in some instances to those organizations which do not profess a belief in God. The testimony of Mr. Arthur in this case, as described in the lower court's opinion (petitioners Murray and Mays' Appendix II, p. 31a), clearly shows that the Baltimore City practice is in accord with Mr. Justice Brennan's statement. The exemption in question is made available, without discrimination, to all sects contemplating the beliefs of a philosophical system, regardless of whether it involves a belief in the existence of a Supreme Being.

Columbia, 116 U.S. 404, 408 (1886); *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890); and *First Unitarian Church v. Los Angeles*, 357 U.S. 545 (1958). And, it has, on at least two occasions, affirmed without opinion decisions of lower federal courts specifically upholding tax exemptions for religious organizations. See *Sovereign Camp, W. O. W. v. Casados*, 21 F. Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938) and *United States v. Department of Internal Revenue of State of Ill.*, 202 F. Supp. 757 (D.C. N.D., Ill., 1962), affirmed, 371 U.S. 21 (1962).

These authorities seem to leave little room for doubt that no federal question of substance is presented in a constitutional attack upon religious tax exemptions.

The main thrust of petitioners' attack upon the exemption is based upon the Establishment Clause of the First Amendment. They say in essence that the exemption amounts to nothing more than a grant of money by the state for the support of churches, which amounts to a constitutionally prohibited establishment of religion. There is nothing in this argument that has not already been rejected many times before. It has never been accepted by any court.

Although a tax exemption may have the same economic effect as a direct grant of money, the legal framework under which its functions is vastly different. At the heart of the legal basis for tax exemptions is the well-settled constitutional principle that the state is free to select its objects of taxation, and pursuant to this power, may altogether decline to tax certain kinds of property, so long as there is a reasonable basis for the exemption. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937); *Williams v. Baltimore*, 289 U.S. 36 (1933). Our tax laws, both state and federal, have been constructed on the theory that

legislatures may elect not to tax certain transactions or classes of property for reasons of policy which would be wholly insufficient to justify direct subsidies. Exemptions which the state legislatures, in their wisdom, grant to individuals or organizations in order to encourage or foster the public good long have been recognized as proper, and all that is required to sustain them is a showing of some fairly discernible relationship between the good of the person receiving the exemption and the good of the community. *Williams v. Baltimore, supra.*

In the exercise of this prerogative to exempt for the public good, the Maryland Legislature, like most other state assemblies, has exempted from taxation numerous kinds and types of organizations, including (in addition to houses of worship), hospitals, schools, charitable institutions, fraternal beneficiary associations, manufacturers, veterans' organizations, credit unions, historical societies, the Boy Scouts, volunteer fire departments, and that is just to name a few. (See Section 9 of Article 81 of the Maryland Code, set forth in petitioners Murray and Mays' Appendix III.) The fact that an exemption from taxation has been accorded to these various organizations certainly cannot mean that the legislature has "established" them as state instrumentalities, or adopted their purposes as state aims. Their selection for tax exempt status only represents a legislative judgment that, for the people in the community affected by these institutions, the encouragement of them will produce socially desirable results, which, in the long run, will be of benefit to all of the people of the state. Churches are but one of the many organizations selected by the legislature as an instrument capable of adding to the general public good, and to say as petitioners apparently contend, that their exemption "establishes" religions is tantamount to saying that the other exemptions must do like-

wise to the other organizations that enjoy them. This, of course, is not the case.

A prohibited establishment must involve active State promotion of religion, such as requiring prayer in the public schools or establishing a belief in God as a requirement to holding public office, *Abington School District v. Schempp*, 374 U.S. 203 (1963) and *Torcaso v. Watkins*, 367 U.S. 488 (1961). It does not include indirect and passive accommodations, such as nondiscriminatory tax exemptions, which infringe no religious freedoms. As Mr. Justices Goldberg, Brennan and Harlan pointed out in the *Schempp* case, *supra*, the First Amendment does not forbid the state to provide accommodations for those people in the community who, in the free exercise of their beliefs, desire to embrace religious doctrine. Indeed, the Free Exercise Clause of the First Amendment may be fairly said to require the states, in their pursuit of neutrality, to provide some accommodation in this area. It is contrary to the constitution for the state to impose certain forms of taxation upon the exercise of religion, *Follett v. McCormick*, 321 U.S. 573 (1944), and while we do not suggest that the state could not constitutionally place a property tax on churches and houses of worship, we do think that the legislature properly could have made and has made a factual judgment that true neutrality required it to refrain from the taxation of religious institutions. We think that the legislature could properly regard the exemption as a practical way to accord the churches and its members complete freedom of religion. It is, in effect, an aid to the private right of the individual to freely exercise the religious beliefs guaranteed him by the First Amendment.

In view of the foregoing, it seems clear that petitioners' constitutional claims fail to present any federal question of substance that this Court should review on certiorari.

B. *No Justiciable Case or Controversy Is Presented*

It is well settled that in order for a person to assert the invalidity of a statute on a First Amendment ground in this Court, he must show that he will sustain some direct injury to his own interests as a result of its enforcement, and not merely that he will suffer in some indefinite way in common with people generally. For that reason, a suit brought by a person in his capacity as a taxpayer will not present a justiciable case or controversy unless he shows some adverse impact on his own individual interests which is different than those of other taxpayers generally. *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Elliott v. White*, 23 F. 2d 997 (D.C. Cir., 1928); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Swallow v. United States*, 325 F. 2d 97, 98 (10th Cir., 1963), cert denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

The present suit was brought by petitioners in their capacity as taxpayers. They have shown no adverse impact on their individual rights as a result of the enforcement of the tax exemption under attack, and, for that reason, they present no justiciable case or controversy subject to review by this Court on certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that both petitions for a writ of certiorari be denied.

Respectfully submitted,

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Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NOS. ~~1309 and 1311~~ 132 + 133

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NOS. 1309 and 1311

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners,*

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, IN OPPOSITION

Respondent, Maryland Synod of the Lutheran Church in America, opposes the granting of a Writ of Certiorari to review the Judgment of the Court of Appeals of the State of Maryland in the instant case, dated and entered

February 14, 1966, affirming the Decree of the Circuit Court No. 2 of Baltimore City, entered on December 14, 1964, dismissing the claim filed by the Petitioners herein, or Remand. In addition to the questions set forth by the Petitioners, the following question is presented in this cause:

Whether or not the constitutional issues attempted to be raised by the Petitioners present a justiciable case or controversy under the provisions of Section 2, of Article III, of the Constitution of the United States.

STATEMENT OF THE CASE

This Court is respectfully referred to the opinion of the Honorable Wilson K. Barnes, Judge in Circuit Court No. 2 of Baltimore City, as appears in the Petition for a Writ of Certiorari filed by the Petitioners herein in Appendix II thereto, beginning on pages 22a-26a, which this intervening Defendant, Appellee, Maryland Synod of the Lutheran Church in America, adopts as its statement of the case and hereby incorporates by reference.

STATEMENT OF FACTS

Maryland Synod of the Lutheran Church in America, adopts the Statement of Facts as set forth in the opinion of Judge Barnes in Appendix II to the Petition for a Writ of Certiorari, pages 26a-36a, and it incorporates said statement herein by reference.

ARGUMENT

We firmly contend that this case does not present any question that this Court ought to review on a Writ of Certiorari. No federal question is involved herein in that the attack upon Article 81, section 9(4) of the Annotated Code of Maryland (Michie, 1957 Edition), involves no cognizable question under the Federal Constitution and does not present a case or controversy to be reviewed by this court under provisions of Section 2, of Article III, of the United States Constitution.

I.

WHETHER OR NOT THE TAXATION OF CHURCH PROPERTY WOULD BE IN VIOLATION OF THE DECLARATION OF RIGHTS AND OF THE FEDERAL CONSTITUTION IN THAT IT WOULD RESTRICT THE FREE EXERCISE OF RELIGIOUS EXERCISES AND RIGHTS.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." First Amendment to the Constitution.

If we apply the above amendment to the several States, under the provisions of the Fourteenth Amendment, can the State then tax church property?

"The power to tax involves the power to destroy," was well stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431.

The moment the State undertakes to tax the Church, that moment the Church becomes subservient to the State. From that moment on, the Church is subject to the whims of politicians; the caprice of taxing authorities; in reality, the control of the State in general. Can it be said that this is not an interference with or a prohibition of the free exercise of religion? We emphatically say it cannot.

In *Knowlton v. Baumhover*, 182 Iowa 691, 704, 166 N.W. 202, 5 A.L.R. 41, it is well stated: "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state."

The power to tax the church invades this absolute separation of church and state. It must necessarily follow that if the State has the power to tax the church, such taxation can then become regulation.

In *Murdock v. Pennsylvania*, 309 U.S. 105, 63 S. Ct. 891, 87 L. Ed. 1292, it was held that the power to impose upon a Jehovah's Witness any tax while promoting his religious teachings and selling religious books and pamphlets was a

tax upon his religion. If this be true, then, a fortiori, a tax upon the building which is used for the worship of God and within the confines of which the word of God is preached and the sacraments are administered is unconstitutional. Separation means separation and nothing else.

Several situations are worthy of consideration, to-wit:

1. To appraise a piece of property, at its perfect market value, is an impossibility. To tax the property of a Church would require the appraisal of that property at its true value. Here, at once, will arise conflict between Church and State in a difference of opinion as to values. It could result in the State giving preference to one sect or body as against another sect or body, or, even to one Church of a denomination, as against another Church of the same denomination. This surely is a prohibition of the free exercise of religion and is avoided by the exemption provisions.

2. If Church property is taxed and, because of economic, or other circumstances, a particular Church should default in the payment of the tax, what happens? The State must step in and sell the property at public auction to the highest bidder for the nonpayment of the taxes. In all probability, title to the property would pass to a nonreligious source and, in turn the Church, or the Congregation thereof, would be ejected from their property. We respectfully submit that if this is not a prohibition of the free exercise of religion then nothing is.

3. The Petitioners imply that by exempting a Church from taxation, the State is contributing to its support. This implication is not sustained by the decisions of our Courts. On the other hand, what would be the situation if the Church were taxed. It would result in the Church contributing to the support of the State. In turn, as to the extent of the tax, activities of the Church would be hampered and hence would result in a prohibition of the free exercise of religion.

For over 165 years, houses of worship, parsonages, and appurtenant ground have been exempt from taxation and from legislative sanction and approval in Maryland. This exemption has been uniformly applied and administered and there has been no difficulty about the matter. Could we have enjoyed this peaceful relationship between Church and State, had the situations aforementioned, or any of them prevailed? Of course not.

We do not deny that the State has the power to tax property owned by a church and which is not used in the exercise of religious activities. This power, however, cannot be extended to apply to property which is used for purposes of religious worship.

We respectfully and firmly submit that no building or property used exclusively for religious worship is taxable under the aforesaid First Amendment of the Constitution.

However, if this Court should by any means find that such property is a proper subject of taxation, then, and in that event, the various legislatures and Congress have the power to exempt any class of property that it chooses from taxation, so long as such exemptions are uniform.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW.

Exemptions of houses of worship and other property used for religious purposes have existed in every state of the Union and the District of Columbia from time immemorial. The leading case in Maryland on the subject of tax exemption is that of *Baltimore City v. Starr Church*, 106 Md. 281, in which at page 285 it is stated:

> "We are not to be understood as denying to the Legislature the power, when State policy and considerations beneficial to the public justify it, to exempt, within reasonable limits, some species of property from taxation. A long continued practice, nearly contemporaneous in its origin with the adoption of the Con-

stitution itself, and many adjudged and carefully considered cases decided by this Court, abundantly support that power. But a power to exempt for reasons and upon considerations which are sufficient to uphold the exemption, is not a power to nullify the Constitution of the State.

"It will not be denied at this late day that the Legislature has the power, within reasonable limits, to exempt certain species or classes of property from taxation, when the public interests so require. This is actually done in the case of houses used exclusively for public worship, and the grounds appurtenant thereto, in the case of graveyards and cemeteries, and in the case of hospitals, asylums, and benevolent institutions. (Code, 1904, Art. 81, Sec. 4.) The validity of provisions of this kind is too well established to be now questioned. But it will be perceived in these cases all the property of the class indicated is exempted. The Legislature does not exempt some houses of public worship and tax others. It does not exempt some graveyards and cemeteries, some hospitals, and then tax other properties of exactly the same kind. It does not arbitrarily say that this particular house of public worship shall be exempt, but that one shall be taxed. On the contrary, all property falling within any one of the classes mentioned in Section 4 is exempt. There is therefore no arbitrary discrimination between different properties of the same kind, but all are treated alike."

There is a long line of decisions in Maryland affirming the above case, and it is cited with approval by the Supreme Court in *Williams v. Baltimore*, 289 U.S. 36, 41, 77 L. ed. 1015, 1021.

Every other jurisdiction of the United States has decided tax exemption cases in harmony with the *Baltimore City v. Starr Church* case, and no such constitutional or statutory exemption has been stricken down.

The *Williams v. Baltimore* case, supra, is probably as near as this Court has ever come to addressing itself to this

constitutional problem. Even so late as the *Abington School District v. Schempp*, 374 U.S. 203, Mr. Justice Brennan in a concurring opinion specifically recognized that tax exemptions of religious organizations were proper.

As one reviews the aforegoing cases and many other cases decided by this Court, it is respectfully submitted that no federal question cognizable by this Court is presented in this Petition.

The Petitioners ground their attack upon the premise that such exemption amounts to a subsidy of religion.

It is respectfully submitted that a tax exemption is not a subsidy. Webster's New International Dictionary defines a subsidy as "a grant of funds or property from a Government, * * * to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public." *Klies v. Linnane*, 156 Pa. Reporter 2d 183, 195. Under the above definition, it is respectfully submitted that a tax exemption is not a subsidy.

It has long been held that the State may tax certain classes of property and may exempt other classes so long as there is a reasonable and proper foundation upon which it is based. *Williams v. Baltimore*, supra. The Maryland Legislature has seen fit to exempt many kinds and types of organizations from taxation, believing that it is in the public good, which are set out in Article 81, Section 9, of the Maryland Code.

One of the beneficiaries of tax exemptions under Section 9 of Article 81 of the Maryland Code is Fraternal Beneficiary Associations (Sec. 9(3)). Certainly it cannot be successfully argued that because of the exemption of such associations from taxation in Maryland, the State has established a fraternal system. It can be no more argued that the granting of such exemption to religious organizations establishes religion which would contravene the Federal Constitution.

President Madison, when he and the founders of our Republic were giving deep consideration to the question of separation of church and state, believed that to allow tax exemptions to houses of worship would lead to encroachment by ecclesiastical bodies into the very Government itself. Time has fully proved that the existence of such tax privileges, which today are in effect in every State of the Union and the District of Columbia, has not resulted in a lowering of the bars of the wall of separation between Church and State. We maintain, therefore, that the establishment clause of the Federal Constitution cannot require and does not require a proscription of such exemptions upon the ground that it is an aid to religion. These tax exemptions are rooted deeply in the economics of our society. One has only to consider, for a moment, the effect that their removal would have upon all of the citizens of America to realize that they are so firmly established that no reasonable person could strike them down.

In *Everson v. Board of Education*, 330 U.S. 1, the Court in referring to the wall of separation between Church and State, said: "That wall must be kept high and impregnable, we could not approve the slightest breach." The Court found that the aid to parochial schools, the subject of that case, did not breach the law.

Mr. Justice Frankfurter in *McCollum v. Board of Education*, 333 U.S. 203, 212, 213, said:

> "The mere formulation of irrelevant constitutional principles is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established Church.' But agreement, in the abstract, that the First Amend-

ment was designed to erect a 'wall of separation between Church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of Judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase."

Another impressive statement in *McCollum v. Board of Education,* supra, is that of Mr. Justice Black, to wit: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Complete freedom of religion can be achieved by the legislature doing exactly what it has done under Section 9(4) of Article 81 by exempting from taxation all property used exclusively for religious worship.

We respectfully submit that no Federal question cognizable by this Court is presented by the Petition for the Writ of Certiorari.

III.

NO JUSTICIABLE CASE OR CONTROVERSY IS PRESENTED

The Petitioners have failed to show in this case under the decision of this Court in *Frothingham v. Mellon,* 262 U.S. 447, that they have standing to have their cause reviewed by this Court as any amount that they may have been called upon to pay would be so small and so insignificant that the doctrine of *de minimis non curat lex* would apply and, therefore, they have no standing in the matter of their Petitions.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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America, Respondent.

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IN THE

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LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION
(The Most Reverend Lawrence J. Shehan, Roman Catholic Archbishop of Baltimore, a corporation sole)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 1309 and 1311

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION
(The Most Reverend Lawrence J. Shehan, Roman Catholic Archbishop of Baltimore, a corporation sole)

This brief is filed in opposition to the Petitions for Certiorari filed by *Lemoin Cree, et al.*, No. 1309, October Term, 1965, and by *Madalyn E. Murray, et al.*, No. 1311, October Term, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 241 Md. 383 and 216 A. 2d 897. The opinion of the Circuit Court No. 2 of Baltimore City is not reported.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on February 16, 1966 and a motion for reargument was denied without opinion on March 2, 1966. These Petitions were filed on May 13, 1966. The jurisdiction of this Court is sought under U.S.C., Title 28, Section 1257(3).

Jurisdiction is challenged by this Respondent.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the provisions and statutes set forth by the Petitioners, the following are involved.

1. Article III, Section 2 of the Constitution of the United States:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."

2. Article 81, Section 9, Annotated Code of Maryland (1957 Edition, 1965 Replacement Volume). The specific exemption in subsection (4) here challenged must be considered in the context of the entire Section so that the Court can assay Maryland tax exemption policy. Section 9 is set forth in full in Appendix III to the Petition of Madalyn E. Murray, Trustee, and Leddie Mays (No. 1311, October Term, 1965).

QUESTIONS PRESENTED

1. Does the statutory exemption violate the Fourteenth Amendment to the Constitution of the United States, to the extent that it applies to the states the prohibition of the establishment clause of the First Amendment?

2. Do the Petitioners have standing to raise this constitutional issue in this Court?

STATEMENT OF THE CASE

This suit challenges a portion of Maryland's property tax exemption statute. The portion attacked exempts from taxation houses of public worship. It was brought by the Petitioners, Murray and Mays, in Circuit Court No. 2 of Baltimore City against appropriate Baltimore City and Maryland officials. Petitioners, Cree and Freethought Society of America, intervened as plaintiffs, and the Respondents, the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church in the Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America, intervened as Defendants.

The complaint, which was brought in Petitioners' capacity as taxpayers, alleged that subsection (4) of Section 9 of Article 81 of the Maryland Code is invalid, as violative of the Federal Constitution, because: (1) it is a law respecting an establishment of religion and prohibiting the free exercise thereof, and (2) it deprives the Petitioners and others similarly situated of property without due process of law. The Respondents answered the complaint denying the Petitioners' claims of unconstitutionality and challenging their standing to sue.

The uncontradicted evidence showed and the trial court found that the exemption, as construed by the taxing authorities, is applied to all buildings used for the purpose of teaching or contemplating the beliefs of any philosophical system, regardless of whether that philosophical system includes a belief in the existence of a supreme being. It also showed that the exemption is applied only to buildings in actual use for such purposes and is not available for property held for future construction or investment or other use. The court found that in Baltimore City the exemption under subsection (4) accounts for only about 13.5% of the property exempted from taxation under the various subsections of Section 9 of Article 81.

The trial court, in a comprehensive opinion held that the Petitioners had standing to sue but that the exemption does not violate the Federal Constitution.

The Court of Appeals of Maryland affirmed the trial court holding that the exemption does not violate the establishment clause because its purpose and primary effect are secular in nature.*

ARGUMENT

I.

PETITIONERS' CLAIM OF VIOLATION OF THE ESTABLISHMENT CLAUSE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Subsection (4) which is challenged here is one of sixty subsections of Section 9. Of those sixty, at least nineteen exempt classes of real estate. Section 9 exempts (in addi-

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* The Court of Appeals also discussed and dismissed a claim of invalidity under the equal protection clause of the Fourteenth Amendment. That claim was not made by the Petitioners in the trial court, was not considered by that court and is not, therefore, before this Court.

tion to church properties) *inter alia* hospitals, educational and literary institutions, charitable institutions, fraternal and benevolent associations, non-profit civic clubs, youth organizations, veterans' organizations, historical societies and volunteer fire departments. These exemptions demonstrate that Maryland, like most other states, has exempted from taxation property, which may fairly be said to be devoted to the public general welfare. Rather than couch its exemption statute in broad general terms, Maryland chose the inductive approach. Section 9 read as a whole is a general statement of legislative policy expressed as the sum of its parts. Each of the parts, including religious properties, are those which Maryland concluded should be encouraged, since they benefit the people of the State. Churches, like the other charitable institutions exempted by Section 9, perform a substantial number of secular functions which would otherwise necessarily be performed by the state. The exemption of churches along with other institutions serving similar secular functions does not constitute an establishment in the constitutional sense. It demonstrates Maryland's neutral legislative policy.

The constitutionality of such exemptions has been upheld in every state in which they have been challenged. *Sisters of Holy Cross v. Town of Brookline,* 198 N.E. 2d 624 (Mass., 1964); *General Finance Corporation v. Archetto,* 176 A. 2d 73 (R. I., 1961); *Fellowship of Humanity v. County of Alameda,* 315 P. 2d 394 (Calif., 1957); *Lundberg v. County of Alameda,* 298 P. 2d 1 (Calif., 1956); *State v. Alabama Educational Foundation,* 163 So. 527 (Ala., 1935); *Garrett Biblical Institute v. Elmhurst State Bank,* 163 N.E. 1 (Ill., 1928); and *City and County of San Francisco v. McGovern,* 152 Pac. 980 (Calif., 1915). They have been sustained wherever challenged in lower federal courts. *Swallow v. United States,* 325 F. 2d 97 (10 Cir.,

1963); *United States v. Department of Revenue of State of Ill.*, 202 F. Supp. 757 (N.D. Ill., 1962); *Sovereign Camp W. O. W. v. Casados*, 21 F. Supp, 989, (N.M., 1938); and, *County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385, (9 Cir., 1883).

This Court has affirmed or refused to consider all such cases brought before it. *Swallow v. United States, supra*, cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963); *United States v. Department of Revenue of State of Ill., supra*, affirmed, 371 U.S. 21 (1962); *General Finance Corporation v. Archetto, supra*, appeal dismissed, 369 U.S. 423 (1961); *Lundberg v. County of Alameda, supra*, appeal dismissed, *sub. nom. Heisey v. County of Alameda*, 352 U.S. 921 (1956); *Sovereign Camp W. O. W. v. Casados; supra*, affirmed, 305 U.S. 558 (1938); and *Santa Clara Co. v. South Pac. Railroad, supra*, affirmed, 118 U.S. 394 (1886). Of these cases *General Finance* and *Heisey* are factually indistinguishable from the case at bar.

For the reasons stated, it appears clear that the decision of the Court of Appeals of Maryland is correct. It is in accord with the applicable decisions of this Court. It is not in conflict with the decisions of other lower courts, either state or federal. Petitioners' constitutional claims fail to present a substantial federal question.

II.

PETITIONERS LACK STANDING TO MAINTAIN THIS ACTION

The holding of a state court that, for its purposes, a taxpayer has standing to challenge the validity of a state statute does not establish that there exists a justiciable case or controversy subject to review by this Court under the provisions of Section 2 of Article III of the Federal Constitution. *Doremus v. Board of Education*, 342 U.S. 429 (1952).

It is axiomatic that Article III, Section 2 requires a good faith pocketbook action. The taxpayer must show that the challenged statute results in some special injury to him. Thus a taxpayer's suit will not present a justiciable case or controversy unless the taxpayer shows some adverse impact on his individual interest, which is different from that of taxpayers generally. *Swallow v. United States,* 325 F. 2d 97 (10 Cir., 1963), cert. denied 371 U.S. 950 (1963), rehearing denied 372 U.S. 925 (1963); *Doremus v. Board of Education, supra; Elliott v. White,* 23 F. 2d 997 (D.C. Cir., 1928); *Frothingham v. Mellon,* 262 U.S. 447 (1923).

The record demonstrates no factual basis for such a conclusion in this case and, therefore, Petitioners present no case or controversy for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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